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UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

November 14 (legislative day, November 6), 1989.—Ordered to be printed

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Mr. Pell, from the Committee on Foreign Relations,
submitted the following

REPORT

[To accompany Treaty Doc. 101-4]

The Committee on Foreign Relations, to which was referred the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on December 20, 1988, having considered the same, reports favorably thereon with understandings and recommends that the Senate give its advice and consent to ratification thereof.

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Purpose of the Convention

The principal purpose of the Convention is to ensure that States adopt and implement effective law enforcement measures to combat illicit traffic in narcotic drugs and psychotropic substances at the national level. The Convention recognizes that the "illicit traffic is an international criminal activity" and requires States to establish specific drug-related offenses under their domestic laws, to provide appropriately severe sanctions, to cooperate in the extradition of accused offenders, and to provide each other mutual legal assistance in the investigation and prosecution of those offenses. States party to the Convention are also obliged to cooperate in a wide range of anti-narcotics activities, including law enforcement and training, crop eradication and demand reduction programs, suppression of illicit trade in precursor chemicals, imposition of controls on use of the mails for trafficking purposes, and the seizure and confiscation of the proceeds from and instrumentalities used in illicit trafficking activities. In addition, States party to the Convention are required to ensure that commercial carriers are not used for illicit traffic and to suppress illicit traffic in free trade zones and free ports. In many respects, the Convention adopts on a multilateral level the same sorts of legal undertakings and cooperative arrangements which the United States and other nations have already developed and implemented on a bilateral basis.

Background

In 1984, the General Assembly of the United Nations unanimously adopted a resolution endorsing the negotiation of a new multilateral convention to complement the existing international drug control conventions, the 1961 Single Convention on Narcotic Drugs, amended by Protocol in 1972, and the 1971 Convention on Psychotropic Substances. These two conventions regulate the legal production and distribution of controlled substances but do not provide an adequate legal basis for addressing and controlling the increased threat from illicit drug trafficking across international borders.

Work on the treaty began in 1984 under UN auspices. A draft convention was initially developed and considered by the UN Commission on Narcotic Drugs, and the resulting revision was reviewed in detail by an intergovernmental group of experts at several sessions during 1987 and early 1988. Based upon the recommendations of that group, the Economic and Social Council of the United Nations decided in May 1988 to convene an international conference of plentipotentiaries to complete the negotiations and to adopt the final version of the convention. That conference took place in Vienna from November 25 to December 20, 1988. The final text of the Convention was adopted by consensus by the 106 States represented at the conference, with 43 States, including the United States, signing the Convention when it was first opened for signature the following day. As of June 21, the other signatories are:

- Afghanistan
- Algeria
- Argentina
- Australia
- Bahamas
- Bangladesh
- Bolivia
- Brazil
- Byelorussian S.S.R.
- Cameroon
- Canada
- Chile
- China, Peoples Rep.
- Colombia
- Costa Rica
- Cote d'Ivoire
- Cuba
- Cyprus
- Denmark
- Egypt
- Finland
- France
- Germany, F.R.
- Ghana
- Greece
- Guatemala
- Holy See
- Honduras
- Indonesia
- Iran
- Israel
- Italy
- Jordan
- Malaysia
- Mauritius
- Mexico
- Monaco
- Morocco
- Netherlands
- Nicaragua
- Nigeria
- Norway
- Panama
- Paraguay
- Peru
- Philippines
- Poland
- Senegal
- Spain
- Sudan
- Suriname
- Sweden
- Tanzania
- Turkey
- U.K.
- U.S.S.R.
- Venezuela
- Yemen
- Yugoslavia
- Zaire
- Zambia
- Ukrainian S.S.R.
- Belgium
- Bulgaria
- Ecuador
- Germany, D.R.
- Mauritania

On June 19, 1989, the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was transmitted by the President to the Senate with the recommendation that the Senate give its advice and consent to ratification.

Major Provisions of the Convention

Offenses and Sanctions. Article 3 of the Convention requires each State party to establish as criminal offenses under its domestic law the following comprehensive list of activities involved in or related to international drug trafficking:

1) The production, manufacture, distribution or sale of any narcotic drug or psychotropic substance contrary to the 1961 Convention and the 1971 Convention, both of which regulate the legal production and distribution of controlled substances;
2) The cultivation of opium poppy, coca bush or cannabis plant contrary to those earlier Conventions;
3) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of illicit trafficking;
4) The intentional manufacture, transport or distribution of materials, equipment and substances for the purpose of illicit cultivation, production or manufacture of narcotic drugs and psychotropic substances; and
5) the organization, management or financing of any of the forgoing offenses.

In addition, the Convention specifically requires criminalization of drug-related money laundering, including the conversion and transfer of property derived from an offense as well as the concealment and disguise of its true nature and source.

States party to the Convention are also required, subject to their constitutional principles and the basic concepts of their legal systems, to establish as criminal offenses:
1) the acquisition, possession or use of property knowingly derived from the above offenses;
2) possession of equipment, materials and chemicals knowingly used in illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
3) publicly inciting or inducing others to commit the above listed offenses;
4) related offenses of conspiracy, participation, aiding and abetting, etc.; and
5) the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provision of the earlier Conventions.

Each State party to the Convention is obliged to make these covered acts punishable by sanctions which take into account the grave nature of the offenses, such as imprisonment, fines and confiscation. The Convention requires competent authorities to take into account factual circumstances making the commission of the offenses particularly serious, such as the involvement of organized criminal groups, use of violence, victimization of minors, prior conviction for similar offenses, and the fact that the offender holds public office.

The Convention provides that the offenses shall not be considered "fiscal offenses", "political offenses" or "regarded as politically motivated" for purposes of its confiscation, extradition and mutual legal assistance articles. Paragraph 11 of Article 1 states that nothing in the article shall affect the principle that the description of the offenses to which it refers and of legal defenses thereto is reserved to the domestic law of a Party and that such offenses shall be prosecuted and punished in conformity with that domestic law.

Jurisdiction

Under Article 4 of the Convention, States party to the Convention are obliged to establish jurisdiction over the covered offenses when they are committed in its territory or on board its vessels or aircraft. A State party may establish jurisdiction over offenses committed by its nations, on board vessels outside its territorial sea which it is properly boarding, and search, and with respect to conspiratorial actions committed outside its territory with a view to commission of a covered offense within its territory.

States party to the Convention are obliged to establish jurisdiction over the covered offenses when the alleged offender is in its territory and it does not extradite him to another Party on the ground that the offense has been committed by one of its nationals. The Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

Confiscation

Article 5 of the Convention requires States party to the Convention to enact far-reaching domestic laws providing for the "confiscation" (i.e., freezing, seizing and forfeiture) of all forms of property used in or derived from covered offenses, including the proceeds of the offense as well as the narcotic drugs and psychotropic substances, materials and equipment, and other instrumentalities. Parties are required to take the necessary measures to allow their appropriate authorities to identify, trace, seize and freeze property as preliminary steps toward the eventual confiscation of that property.

The Convention requires States party to the Convention to enable their courts or other competent authorities to order the production or seizure of bank, financial and commercial records necessary to trace, identify, seize and forfeit proceeds and instrumentalities of drug trafficking. It specifies that Parties shall not decline to act on the grounds of bank secrecy.

In addition, States party to the Convention are required, upon request, to assist each other by taking measures to identify, trace and freeze or seize proceeds, property, instrumentalities or any other things for the purpose of eventual confiscation either by the requesting Party or its own authorities. In this connection, the Convention establishes a procedure by which one Party may ask another to assist it by forfeiting proceeds or instrumentalities located in the requested Party's territory. The Convention explicitly recognizes that the disposition of confiscated property and proceeds is a matter of domestic law, but encourages agreements between the Parties for either contributing the value of confiscated property to inter-governmental bodies specializing in the fight against illicit drug traffic, or sharing the proceeds and property with other Parties on a regular or case-by-case basis.

Where proceeds from illegal activity have been intermingled with property from legitimate sources, the Convention provides for confiscation up to the assessed value of the intermingled proceeds. Paragraph 8 of this article states that the provision of this article shall not prejudice the rights of bona fide third parties.

Paragraph 9 of this article clarifies that nothing in this article affects the principle that measures taken in accordance with the article shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.

Extradition

Article 6 of the Convention amends existing extradition treaties between States party to the Convention to include the covered offenses as extraditable offenses and provides that they shall be extraditable offenses between States which do not make extradition conditional on an extradition treaty. The Convention recognizes that extradition is subject to conditions provided by the law of the requested Party or applicable extradition treaties, but calls upon States party to the Convention to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of covered offenses. States party to the Convention are encouraged to conclude bilateral and multilateral agreements to enhance the effectiveness of extradition.

In considering extradition requests under the Convention, the requested State may refuse to comply with the request where there are "substantial grounds" leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.

The Convention also provides that if an extradition request is refused because the person sought is a national of the requested Party, the requested Party shall, if its law permits and if requested by the other Party, consider enforcing the sentence which has been imposed under the law of the requesting Party.

Mutual Legal Assistance

Article 7 of the Convention provides a treaty obligation to provide the widest measure of mutual legal assistance to other States party to the Convention in investigations, prosecutions or other judicial proceedings in relation to covered offenses. Such assistance may be requested for the taking of evidence, service of documents, executing searches and seizures, examining objects and sites, providing bank, financial and business records, an identifying and tracing proceeds and instrumentalities of crime. Other forms of mutual legal assistance may be provided as allowed by the domestic law of the requested Party.

Significantly, the Convention eliminates bank secrecy as a ground for refusing a request for mutual legal assistance.

Like the bilateral mutual legal assistance treaties, the Convention requires written requests for assistance which much include:

1) the identity of the authority making the request;
2) the subject matter and nature of the investigation, prosecution or proceeding to which the request relates, and the name and the functions of the authority conducting such investigation, prosecution or proceeding;
3) a summary of the relevant facts;
4) a description of the assistance sought and details of any particular procedure the requesting Party wishes to be followed;
5) where possible, the identity, location and nationality of any person concerned; and
6) the purpose for which the evidence, information or action is sought.

Requests for assistance may be refused if the request is not made in conformity with the Convention; if the requested Party considers that compliance with the request is likely to prejudice its sovereignty, security, ordre public, or other essential interests; if the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to a similar offense had the offense been subject to its own laws and procedures; and if it would be contrary to the legal system of the requested Party.

The Convention allows for delay in granting a request for assistance on the ground that it interferes with an ongoing investigation, prosecution or proceeding.

Article 8 of the Convention also provides for the possibility of transfer of criminal proceedings for covered offenses, where such transfer would be in the interests of a proper administration of justice.

Specific Enforcement Measures

Article 9 requires States party to the Convention to undertake other, less formal forms of assistance, cooperation and training to enhance the effectiveness of law enforcement action, such as establishing direct channels of communication between law enforcement authorities, assisting in particular inquiries concerning the identity and whereabouts of suspects, the movement of drugs, proceeds, instrumentalities and property, and monitoring the import and export of narcotic drugs and psychotropic substances.

Various provisions of the Convention contemplate adoption and use of certain law enforcement measures addressed specifically to illicit trafficking across national boundaries. For example, Article 11 of the Convention calls upon States party to the Convention to take the necessary measures to allow for the use of controlled deliveries at the international level. In this context, "controlled delivery" describes the known passage of an illicit consignment through a territory in which the authorities elect not to immediately effect an arrest or seizure in order to trace the onward movement of the consignment and to identify higher levels of the trafficking organization. While use of controlled delivery is common in the United States, a number of countries indicated legal impediments to cooperating in such efforts absent a specific treaty obligation.

Under Article 15, States party to the agreement are required to take steps to ensure that means of transport operated by commercial carriers are not used in the commission of covered offenses. Each State party is to require that commercial carriers take precautions to prevent the use of their means of transport for illicit trafficking. In addition, Article 19 of the Convention calls upon States party to adopt measures to suppress the use of the mails for illicit traffic, including through the introduction of investigative and control techniques to detect illicit consignments. States party also apply suppressive measures in their free trade zones and free ports that are no less stringent than those applied in other parts of their territory; such measures include monitoring the movement of goods and services, establishing systems to detect illicit consignments, and maintain surveillance systems in harbor and dock areas.

With respect to suppressing illicit traffic by sea, Article 17 of the Convention requires Parties to cooperate to the fullest extent possible, in conformity with the international law of the sea. It provides that a Party with reasonable grounds to suspect that a vessel displaying the flag or mark of registry of another Party is engaged in illicit traffic may request the flag State's authorization to take appropriate measures, including boarding and searching the vessel. The Convention provides that the flag State may subject its authorization to mutually agreed conditions, including conditions relating to responsibility.

Diversion of Chemicals

Article 12 of the Convention includes provisions for prevention of diversion at the national level and for cooperation among States party at the international level. It includes specific obligations with respect to monitoring suspicious shipments, providing for proper labelling and documentation of shipments, and maintenance of records. The Convention lists, in two Tables, chemicals covered by these provisions.

Separately, States party to the Convention are required to take appropriate action to prevent trade in and diversion of common materials and equipment used in the illicit manufacture of narcotic drugs and psychotropic substances.

Eradication and Demand Reduction

Article 14 of the Convention obliges each Party to take appropriate measures to prevent the illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannibis plants cultivated illicitly in its territory. In this regard, Parties cannot take measures pursuant to this Convention which are less stringent than those stipulated by the 1961 Single Convention, as amended, and the 1971 Psychotropic Substances Convention. Parties are also obliged to take appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances.

The Convention calls upon signatories to assist and support transit States and, in particular, developing countries in need of such assistance and support through programs of technical cooperation on interdiction and other related activities.

Supervising Mechanisms

Articles 21-23 of the Convention assign to the International Narcotics Control Board, which was established by the Single Convention, broad supervisory responsibilities in a manner consistent with the oversight role accorded it by the two existing international drug control treaties. Specifically, the Board has oversight with respect to the provisions concerning illicit manufacture of narcotic drugs and psychotropic substances, materials and equipment, commercial documentation and labelling of exports. The Board is required to prepare an annual report concerning the information at its disposal. In addition, the United Nations Commission on Narcotic Drugs is given certain supervisory responsibilities likewise consistent with the oversight role accorded the Commission by the two predecessor Conventions. In particular, the Commission is empowered to review the operation of the Convention, to make suggestions and general recommendations based on the information received from States party, and to take action on matters referred to it by the International Narcotics Control Board.

Article 32 of the Convention, concerning dispute settlement, permits States party to submit disputes to the International Court of Justice in the event that those disputes cannot be settled by other peaceful means of the Parties' choice, including negotiation, mediation, conciliation, and arbitration. The State Department has recommended that, at the time of ratification, the United States exercise its right under paragraph 4 of that Article to declare, by means of reservation, that it does not consider itself bound to submit to the compulsory jurisdiction of the Court in respect of disputes arising under this Convention.

Entry Into Force

The Convention will enter into force ninety days after the date on which twenty States have indicated their intent to be bound by depositing instruments of ratification, acceptance, approval or accession.

Committee Comments

In its consideration of the Convention, the Committee adopted three understandings proposed by Senator Helms. The first, identical to the understandings adopted by the Senate on the bilateral Mutual Legal Assistance Treaties with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand, states "that nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States." This understanding is an affirmation by the Committee of the supremacy of the U.S. Constitution over treaties and conventions.

The second understanding adopted by the Committee relates to Article 6, Extradition. It simply states that the recognition contained in Paragraph 3 that a Party which requires a treaty basis for extradition may consider this Convention as that required basis is inapplicable to the United States. The U.S. inability to use this Convention as the basis for extradition in the absence of a bilateral treaty is based on U.S. case law and the provisions of our extradition statute.

The final understanding adopted, also essentially identical to understandings adopted by the Senate on the bilateral Mutual Legal Assistance Treaties enumerated above, relates to obligations under article 7 of the Convention, Mutual Legal Assistance. Paragraph 15 of article 7 specifies classes of requests in which assistance may be refused, permitting refusal if the assistance would prejudice the sovereignty, security, ordre public or other essential interests of the requested Party. The understanding states that the United States shall deny legal assistance when the designated authority, the U.S. Justice Department, has specific information that a senior government official who will have access to information being requested is engaged in drug trafficking, pursuant to its grounds for refusal on the basis of protecting U.S. essential interests. This understanding is intended to clarify that the U.S. will not provide assistance to corrupt officials, thereby subverting the very purpose of the Convention. The Committee emphasizes, however, that the understanding does not convert the article's mandatory provisions to discretionary ones in cases not involving non-corrupt foreign officials.

COMMITTEE ACTION

The committee held a public hearing on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances on August 2, 1989. Senator Pell presided at the hearing, and Attorney General Richard L. Thornburgh and M. Cherif Bassiouni, Professor of Law, DePaul University, presented testimony.

The committee met to consider and vote on the convention at its November 2, 1989, business meeting. Senator Helms offered the following four understandings to the treaty:

> An understanding to assure that no actions are taken by the United States in contravention to the U.S. Constitution; and
>
> An understanding to clarify that no extraditions will be undertaken by the United States to countries with which the United States does not have an extradition treaty;
>
> An understanding to prevent the United States from granting assistance to foreign officials who engage in, encourage, or facilitate the production or distribution of illegal drugs;
>
> An understanding to prevent the United States from being bound under the treaty to countries with which the United States does not maintain diplomatic relations or countries that are controlled by a government not recognized by the United States.

A question arose concerning the State Department's position on the understanding dealing with diplomatic relations and recognition. Because a representative from the State Department was not present at the meeting to advise the committee of the department's views, it was agreed that the committee would defer consideration of that understanding until the treaty is before the full Senate, by which time it is anticipated that the State Department will inform the committee of its position.

The committee then approved by a vote of 19–0 the resolution of ratification with the other three understandings. Voting in the affirmative were Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Moynihan, Robb, Helms, Lugar, Kassebaum, Boschwitz, Pressler, Murkowski, McConnell, Humphrey, and Mack.

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REPORT
# of the
UNITED STATES DELEGATION
to the
UNITED NATIONS CONFERENCE
for the adoption of a
CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

Vienna, Austria

November 25-December 20, 1988

Submitted to the SECRETARY OF STATE

Ann B. Wrobleski
Assistant Secretary for
International Narcotics Matters
Chair of the Delegation

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B. Article-by-Article Analysis

PREAMBLE

Final Text

The Parties to this Convention,

Deeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society,

Deeply concerned also by the steadily increasing inroads into various social groups made by illicit traffic in narcotic drugs and psychotropic substances, and particularly by the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity,

Recognizing the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States,

Recognizing also the illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority,

Aware that illicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels,

Determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing,

Desiring to eliminate the root causes of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances and the enormous profits derived from illicit traffic,

Considering that measures are necessary to monitor certain substances, including precursors, chemicals and solvents, which are used in the manufacture of narcotic drugs and psychotropic substances, the ready availability of which has led to an increase in the clandestine manufacture of such drugs and substances,

Determined to improve international cooperation in the suppression of illicit traffic by sea,

Recognizing that eradication of illicit traffic is a collective responsibility of all States and that, to that end, co-ordinated action within the framework of international co-operation is necessary,

Acknowledging the competence of the United Nations in the field of control of narcotic drugs and psychotropic substances and desirous that the international organs concerned with such control should be within the framework of that Organization,

Reaffirming the guiding principles of existing treaties in the field of narcotic drugs and psychotropic substances and the system of control which they embody,

Recognizing the need to reinforce and supplement the measures provided in the Single Convention on Narcotic Drugs, 1961, that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, and the 1971 Convention on Psychotropic Substances, in order to counter the magnitude and extent of illicit traffic and its grave consequences,

Recognizing also the importance of strengthening and enhancing effective legal means for international co-operation in criminal matters for suppressing the international criminal activities of illicit traffic,

Desiring to conclude a comprehensive, effective and operative international convention that is directed specifically against illicit traffic and that considers the various aspects of the problem as a whole, in particular those aspects not envisaged in the existing treaties in the field of narcotic drugs and psychotropic substances,

Hereby agree as follows:

Comment:

The Preamble reflects the underlying - and to some extent differing - concerns of the participants at the conference which led to the negotiation of the Convention. Of particular note from the U.S. perspective are the statement in the fourth preambular paragraph that illicit trafficking is "an international criminal activity", the reaffirmation of the guiding principles of existing treaties in the twelfth paragraph, and the emphasis in the next-to-last paragraph on the "importance of strengthening and enhancing effective legal measures for international cooperation in criminal matters".

Article 1 - DEFINITIONS

Final Text:

Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout this Convention:

(a) "Board" means the International Narcotics Control Board established by the Single Convention on Narcotic Drugs, 1961, and that Convention was amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;

(b) "Cannabis plant" means any plant of the genus Cannabis;

(c) "Coca bush" means the plant of any species of the genus Erythroxylon;

(d) "Commercial carrier" means any person or any public, private or other entity engaged in transporting persons, goods or mails for remuneration, hire or any other benefit;

(e) "Commission" means the Commission on Narcotic Drugs of the Economic and Social Council of the United Nation;

(f) "Confiscation", which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority;

(g) "Controlled delivery" means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, substances in Table I and Table II annexed to this Convention, or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences established in accordance with article 3, paragraph 1 of the Convention;

(h) "1961 Convention" means the Single Convention on Narcotic Drugs, 1961;

(i) "1961 Convention as amended" means the Single Convention on Narcotic Drugs 1961, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;

(j) "1971 Convention" means the Convention on Psychotropic Substances, 1971;

(k) "Council" means the Economic and Social Council of the United Nations;

(l) "Freezing" or "seizure" means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or a competent authority;

(m) "Illicit traffic" means the offences set forth in article 3, paragraphs 1 and 2, of this Convention;

(n) "Narcotic drug" means any of the substances, natural or synthetic, in Schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;

(o) "Opium poppy" means the plant of the species Papaver somniferum L;

(p) "Proceeds" means any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1;

(q) "Property" means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

(r) "Psychotropic substance" means any substance, natural or synthetic, or any natural material in Schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971;

(s) "Secretary-General" means the Secretary-General of the United Nations;

(t) "Table I" and "Table II" mean the corresponding numbered lists of substances annexed to this Convention, as amended from time to time in accordance with article 12;

(u) "Transit State" means a State through the territory of which illicit narcotic drugs, psychotropic substances and substances in Table I and Table II are being moved, which is neither the place of origin nor the place of ultimate destination thereof.

Comments:

(a): The definition of "Board" is self-explanatory.

(b): The definition of "cannabis plant" is intentionally broad and is meant to cover all parts of the plant. It is identical to the definition contained in the Single Convention.

(c): The definition of "coca bush" is identical to the one in the Single Convention.

(d): The definition of "commercial carrier" is intended to be all-inclusive. The words "or other" were added before "entity" in order to make it as broad as possible and enable it to apply to entities that were neither public nor private. This definition is broad enough to encompass private aircraft.

(e): The definition of "Commission" is self-explanatory.

(f): The definition of "confiscation" was included to ensure that the term is understood to mean the permanent, final deprivation of ownership of property by a court or other competent authority. The reference to the concept of forfeiture underscores that it is synonymous with that concept as used in United States law.

(g): The definition of "controlled delivery" was deemed necessary to clarify the obligations undertaken by Parties by operation of Article 11, in particular because the use of this particular law enforcement technique is uncommon in some countries.

(h),(i), (j): These definitions are self-explanatory; they were included to allow short-hand references to the earlier conventions.

(l): Although the concept of legally "freezing" or "seizing" property is almost universally recognized, this definition clarifies those concepts particularly for countries which have not yet enacted domestic forfeiture laws. As used in the Convention, they are substantially synonymous with U.S. law.

(m): "Illicit traffic" was defined by reference to the offenses set forth in art. 3, paras. 1 and 2 to clarify that the personal possession offenses are also included. In fact, the term is rarely used in the text of the Convention and most provisions generally refer to specific offenses listed in Article 3.

(n): The definition of "narcotic drug", together with the definition of "psychotropic substances", identifies the substances which are the subject of this Convention. It includes all substances listed in the annexed Schedules, not only those which are pharacologically narcotic. All listed substances are "controlled substances" under United States law.

(o): The definition of "opium poppy" is identical to the one in the Single Convention.

(p): The term "proceeds" as used in this Convention includes all property derived or obtained from an offense listed in Article 3, paragraph 1, including profits thereof. By contrast, the term "instrumentalities" means all property used or intended for use in an offense.

(q): "Property" is defined broadly to encompass intangible ownership rights as well as physical objects.

(r): The term "psychotropic substances" is defined by reference to the schedules adopted under the 1971 Convention. The United States is a party to that convention, and all of the substances on the schedules are "controlled substances" under United States law.

(s),(t): The definitions of "Secretary-General", "Table I" and "Table II" are self-explanatory.

(u): A definition of "transit state" was included to clarify the meaning of Article 10.

Article 2 - SCOPE OF THE CONVENTION

Final Text:

1. The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their perspective domestic legislative systems.
2. The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.

Comments:

The negotiating history of this article differs significantly from that of all others in the Convention. The general outline of every other article was known and generally accepted from the early stages of the negotiating process. By contrast, the proposal for a "scope of the Convention" article was not made until the meeting of the Review Group in the summer of 1988. At that meeting, Mexico, which had previously played a fairly minor role in the preparation of the Convention, proposed far-reaching and radical changes in the text. One of Mexico's major proposals was to insert a "scope" article immediately after the definitions (Article 1) that would establish in broad terms the intent of the Convention and determine the relationship of the Convention to domestic and international law. In broad outline, the proposal would have characterized the Convention very narrowly as an "instrument of international cooperation", the implementation of which would be limited by "the most strict respect for" the internal legal system of each Party. It emphasized the necessity of complying with local law, respecting the express reservation by States of jurisdiction and competence to their own authorities, and not requiring States in complying with the Convention to exceed their own legal jurisdiction and competence under existing domestic law. In other words, the proposal would have severely eroded one of the most important objectives of the Convention. See E/CONF.2/3.

This proposal was strongly opposed by the U.S. delegation at the Review Group. The delegation argued that consideration of a proposal for an entirely new article dealing with a subject never before raised was beyond the Review Group's mandate and that, in any case, there was no objective need for any such article in the Convention. The Review Group decided, despite these objections, to include the Mexican proposal in the text it sent forward to the Plenipotentiary Conference, placing it, however, in square brackets to indicate that it was not an agreed text.

At the Conference the Mexican proposal for Article 1(bis) was supplanted early in the negotiations by a less objectionable Mexican-Canadian proposal, which nonetheless was still opposed by the U.S. delegation as superfluous, premature and inappropriate. However, debate in Committee I revealed that a number of Western European delegations that had previously opposed a scope article had changed their positions. In particular, a proposal by the United Kingdom, dealing with the crucial issue of the relationship between the obligations undertaken by Parties and their pre-existing domestic law, received broad support.

This debate convinced the U.S. delegation that the Convention would, for political reasons, need to contain a "scope" article. Accordingly, the U.S. delegation proposed wording for such an article. After informal consultations with other delegations (including Mexico) which resulted in a few small changes in the U.S. proposal, a final text with very few modifications was agreed upon. It was adopted by consensus.

As agreed, the first sentence of paragraph 1 states in positive and unambiguous terms the fundamental purpose of the Convention. The second sentence imposes a general obligation on Parties to take "necessary measures" including alterations of their domestic law and administrative procedures to the extent necessary to conform them to the terms of the Convention. The final phrase of the second sentence is intended to make clear that each Party may take the necessary measures in a manner consistent with its fundamental provisions of domestic legislative systems. In contrast to the original Mexican proposal, it should be noted that the second sentence can not be read to permit Parties to escape their obligations under the Convention by arguing that they are inconsistent with domestic law.

Paragraph 2 notes the obligations of the Parties to respect the concepts of sovereign equality, territorial integrity and non-intervention in domestic affairs, as they are enshrined in Article 2 of the UN Charter, to which all UN members are obligated. Accordingly, those concepts should be defined and applied in this Convention in the same way as they are in the context of the Charter.

The third paragraph restates the corresponding provision of the original Mexican proposal, which reflected concern that the Convention not be interpreted to allow law enforcement officials of one Party to operate on the territory of another Party in drug cases absent agreement between the two Parties concerned. Paragraph 3 does no more than state in more specific terms one aspect of the duty to respect territorial integrity and not to intervene in domestic affairs contained in paragraph 2.

Article 3 - OFFENCES AND SANCTIONS

Final Text:

1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

(a)(i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substances contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

(ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

(iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;

(iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(v) The organization, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;

(b)(i) The conversion or transfer of property, knowing that such property is derived from any offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;

(c) Subject to its constitutional principles and the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offences or offences;

(ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;

(iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

3. Knowledge, intent or purpose required as a element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

4. (a) Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such an imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.

(b) The Parties may provide, in addition to conviction or punishment, for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration.

(c) Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.

(d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

5. The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious, such as:

(a) The involvement in the offence of an organized criminal group to which the offender belongs;

(b) The involvement of the offender in other international organized criminal activities;

(c) The involvement of the offender in other illegal activities facilitated by commission of the offence;

(d) The use of violence or arms by the offender;

(e) The fact that the offender holds a public office and that the offence is connected with the office in question;

(f) the victimization or use of minors;

(g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;

(h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party.

6. The Parties shall endeavor to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offenses established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

7. The Parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences.

8. Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice.

9. Each Party shall take appropriate measures, consistent with its legal system, to ensure that a person charged with or convicted of an offence established in accordance with paragraph 1 of this article, who is found within its territory, is present at the necessary criminal proceedings.

10. For the purpose of co-operation among the Parties under this Convention, including, in particular, co-operation under article 5, 6, 7 and 9, offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the Parties.

11. Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defenses thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.

Comments:

Article 3 is the cornerstone of the Convention. It sets forth two categories of substantive offenses which parties are either obligated or permitted to make criminal. It is designed to focus on the fundamental law enforcement measures necessary to combat the dual problems of international drug trafficking and money laundering. The article focuses and imposes the greatest international obligations on those offenses which have the most international impact. Therefore, although the Convention recognizes that the demand for narcotic drugs and psychotropic substances fuels illicit international trafficking, criminalizing personal use offenses is mandatory but subject to the constitutional principles and the basic concepts of each Party's legal system. Fewer international obligations are imposed on Parties to assist in the investigation and prosecution of these offenses. Domestic and international strategies for reducing the demand for illegal drugs are, for the most part, not the subject of the Convention.

Paragraph 1 and 2 of this article were carefully crafted to include a mandatory obligation on the part of the States Party to enact legislation criminalizing specific categories of narcotics and money laundering offenses. These mandatory offenses are not limited by the chapeau "subject to its constitutional principles and the basic concepts of its legal system". Making these categories of offenses mandatory was a significant accomplishment.

The specific narcotic drugs and psychotropic substances covered by these offenses are those substances and drugs under international control pursuant to the provisions of the Single and Psychotropic Substances Conventions. The United States is a party to both these Conventions. Our schedules of controlled substances include all drugs and substances under international control under both conventions. There are a few substances subject to control in the United States which are not controlled internationally.

Paragraph 1(a) is intended to be an all-inclusive list of illicit drug trafficking offenses. It was subdivided into subparagraphs (i) to (v) to clarify and distinguish the acts involved. Subparagraph (i) reproduces the list of criminal acts contained in the Single Convention with the exception of cultivation, possession, and purchase. Cultivation is covered separately in subparagraph (ii) because, of all the illicit narcotic drugs and psychotropic substances subject to international control, only marijuana, coca bushes and the opium poppy are cultivated. Possession and purchase were covered separately in subparagraph (iii). Possession, purchase and cultivation for personal use are also covered in paragraph 2.

Subparagraph (iv) includes the manufacture, transport or distribution of materials, equipment and substances in Tables I and II (precursor and essential chemicals) knowing that they are to be used to manufacture, cultivate or produce narcotic drugs or psychotropic substances. This provision is new and is intended to criminalize the acts of those who knowingly supply essential materials or chemicals to produce or cultivate illegal drugs.

Subparagraph (v) requires the criminalization of the financing, organizing, or managing of any of the acts listed in subparagraphs (i) to (iv). The negotiators believed that the inclusion of this subparagraph was extremely important to reach the highest levels of international drug trafficking. This provision is a significant step forward from the Single Convention which only addresses the financing of drug trafficking and limits the obligation to criminalize financing to the limitations of a Party's constitution, legal system and domestic law. This paragraph combines provisions of law separately designated in the U.S. Code including: 18 U.S.C. 1956 and 1957 (money laundering), 18 U.S.C. 1961 (RICO), and 21 U.S.C. 848 (CCE).

All of the offenses listed in paragraph 1(a) are presently criminal offenses under Title 21 of the United States Code. The distribution, transport, or manufacture of precursor or essential chemicals or materials or equipment knowing they are to be used in illicit drug offenses have been criminalized under the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690).

Subparagraph (b) imposes an obligation on parties to criminalize illegal drug related money laundering. Much of the language is derived from the United States statutes on money laundering (see, e.g., 18 U.S.C. sections 1956-57). Two modifications were made in the U.S. statutes. First, the paragraphs relate only to property derived from offenses established in accordance with subparagraph (a), that is, illegal drug offenses. Second, because the Convention makes no attempt to impose currency reporting requirements, there are no references to actions to avoid such reporting requirements. The language "from an act of participation in such offense or offenses" was included in subparagraphs (b)(i) and (ii) to insure that the laundering of property derived from conspiracy offenses was included in the coverage of the offense. The language "or of assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his action" in paragraph (b)(i) is intended to ensure that it is an offense for a person to intentionally convert or transfer property knowing that property is derived from an illicit trafficking offense with the purpose of assisting a person involved in the offense to avoid forfeiture proceedings or discovery of his illicit trafficking and the subsequent criminal proceedings. Because the language of paragraph (b)(i) requires a specific intent to either convert or transfer property or to assist a person to evade discovery of his illegal actions or of the illicit source of his income, it is not intended and does not reach legitimate payment of attorney's fees. Thus, if an attorney received money for legitimate representation purposes, he/she could not be prosecuted if it turned out that the money was derived from a narcotics offense. The paragraph requires a "conversion or transfer" for the purpose of "concealing or disguising " assets or "evading the legal consequences of his action". The term "evasion" implies criminal purpose -- not legal avoidance through *bona fide* representation by counsel. Current United States money laundering laws, 18 U.S.C. 1956-57, satisfy United States obligations to establish these offenses.

Subparagraph (c) lists the permissive categories of offenses that the Parties are obligated to establish as offenses under their domestic law. The obligation to establish these offenses is qualified by the limiting chapeau, "subject to its constitutional principles and the basic concepts of its legal system." There were a number of reasons that the negotiators believed that the obligation to enact these offenses had to be limited. First, because some legal systems allow little or no discretion to the police and prosecutors, it was believed impossible to formulate offenses that all parties could agree to that would not sweep innocent conduct into its proscribed conduct. Second, some offenses, such as conspiracy offenses, are not titled the same nor do they involve exactly the same elements in various states; indeed, some legal systems specifically prohibit conspiracy offenses. Thus, although there are similarities between such offenses as criminal association and conspiracy, the legal concepts differ from legal system to legal system. Third, the United States negotiators were concerned that a literal reading of some of these offenses might create unconstitutional offenses in the United States. In particular, subparagraph (c)(iii) could be read to include conduct protected by the First Amendment. By limiting a Party's obligation to enact legislation to create offenses in these categories to the extent consistent with its constitutional principles and the basic concepts of its legal system, constitutional and definitional difficulties can be more easily eliminated.

The first subparagraph requires each Party to criminalize the acquisition, possession or use of property if the offender knew at the time of receipt of the property that it was derived from an Article 3, paragraph 1 offense. At the negotiations it was recognized that the limiting chapeau was important here because the conduct described could criminalize a purchase by a bona fide purchaser for value.

The second subparagraph, subparagraph (ii), requires parties to criminalize the possession of equipment, materials, and chemicals (substances in Tables I and II) if the offender knew that they were being used or intended for use in the illicit cultivation, manufacture or production of illicit narcotic drugs and psychotropic substances.

Subparagraph (iii) requires parties to criminalize the incitement or inducement of others to commit any other offense established according to Article 3. This offense is very broadly drawn and references not only other Article 3 paragraph 1 offenses, but all article 3 offenses. Thus it also includes inducement of others to purchase, possess or cultivate illegal drugs for personal use.

Subparagraph (iv) includes an obligation to enact as criminal offenses such offenses as conspiracy and aiding and abetting offenses.

Paragraph 2 also represents a compromise among states on how severely to treat possession, purchase or cultivation of illicit narcotic drugs and psychotropic substances for personal use. While recognizing that personal use offenses should be treated as criminal offenses, the Parties qualified the obligation with the chapeau "subject to its constitutional principles and the basic concepts of its legal system." The placement of these offenses in a separate paragraph was deliberately done for two reasons. First, in order to limit the international obligations in the articles on mutual legal assistance, forfeiture and extradition, it was believed necessary to separate personal use offenses from the trafficking offenses in paragraph 1 of Article 3. Because international assistance in extradition, mutual legal assistance and forfeiture are often expensive and time consuming procedures for both the requested and requesting Parties, the negotiators did not want to impose these obligations on Parties for offenses of a more minor nature. Second, the personal use offenses were separated to allow Parties to impose alternative sanctions such as treatment and rehabilitation programs rather than incarceration in appropriate cases.

Paragraph 3 is included to clarify that the requisite elements of knowledge, intent or purpose in the offenses described in this Article may be inferred from objective facts. The purpose of this paragraph is to state that the inclusion of those elements in the description of the offenses is not intended to change in any way the level or form of proof required by a Party's domestic law. Thus the paragraph affirms the possibility of proving these elements circumstantially.

Paragraph 4 is designed to obligate Parties to treat illicit drug offenses as serious offenses subject to such penalties as imprisonment, fines and forfeiture. At the same time the negotiators recognized that, for minor offenses or for simple possession offenses, rehabilitation or treatment programs may be provided as an alternative to imprisonment.

Paragraph 5 provides a non-exhaustive list of factors which courts or other competent authorities should be able to consider in deciding on the appropriate sanctions. Factors that the negotiators considered to make more serious the offense, or the offender's role in the offense, are traditional factors recognized as aggravating factors under United States law and practice. See Title 18, United States Code, Section 3553 and Chapter 3, Sentencing Guidelines. They include such factors as the involvement of an organized criminal group, the use of firearms or violence and the use or victimization of minors.

Paragraph 6 is a hortatory paragraph calling on Parties whose legal systems grant discretion in the prosecution of persons for Article 3 offenses to exercise this discretion in ways that maximize law enforcement and deter others from the commission of such offenses. United States law vests broad discretion in the Executive branch to initiate or forego prosecution. It is the obligation of the Executive branch to see that the laws of the United States be "faithfully executed." U.S. Const., Art. II, Sec. 3. In exercising its discretion, United States law enforcement officials are guided by the "Principles of Federal Prosecution." See U.S. A.M. 9:27.000. Those principles call for a weighing of relevant factors, including the seriousness of the offense, the person's culpability and criminal history and the deterrent effect of prosecution.

Paragraph 7 requires Parties to ensure that their courts or other competent authorities consider the seriousness of paragraph 1 offenses and the existence of aggravating circumstances listed in paragraph 5 when considering the early release or parole of persons convicted of paragraph 1 offenses. The Sentencing Reform Act of 1984, implemented November 1, 1987, Title 18, United States Code, Section 3557 et seq. introduced determinate federal sentences and abolished parole. The seriousness of drug offenses is reflected in U.S. law in the mandatory minimum sentences to be imposed for many controlled substance violations. See, e.g., 21 U.S.C. §§ 841, 846, 848.

Paragraph 8 requires each party to establish where appropriate a mechanism for tolling the statute of limitations for illicit trafficking offenses and to extend that limitation period when the alleged offender has evaded that Party's criminal justice authorities. The United States statute of limitations for non-capital felony controlled substances violations is five years. Unlike many other states, our limitation period is tolled by the filing of an indictment. Title 18, United States Code, Section 3282. Section 3290 of Title 18 also tolls the running of the statute of limitations if the person flees from justice. The limitations period may also be suspended for a period to allow the United States to obtain evidence in a foreign country. 18 U.S.C. § 3292. These provisions of U.S. law create appropriately long limitations periods.

Paragraph 9 directs Parties to take whatever measures are necessary and consistent with their domestic laws to ensure that persons accused or convicted appear at the necessary criminal proceedings. United States statutes on release and detention pending trial and sentence are designed to permit our courts to impose such conditions of bail as will reasonably assure a person's presence or to detain a person if no conditions will reasonably assure the appearance of the person. Title 18, United States Code, Section 3142 _et seq_.

Paragraph 10 states that for purposes of cooperation among Parties, offenses established pursuant to this Article shall not be considered fiscal offenses, political offenses or politically motivated offenses. This paragraph obligates Parties not to refuse to cooperate because their domestic law or a bilateral or multilateral treaty exempts fiscal, political or politically motivated offenses from any international obligations to cooperate. This paragraph clearly states that illegal drug and money laundering offenses are not, by definition, political or fiscal offenses. It also states that if a Party recognizes a limitation to its obligation to cooperate for offenses committed for political reasons, such as drug trafficking to raise money for a political group, that limitation shall not apply. This paragraph, however, in no way limits a Party's right to refuse to assist another Party because the request for assistance itself is made for political purposes rather than as part of a genuine investigation of illicit drug trafficking. Although there is universal agreement that drug trafficking offenses are not by their nature political offenses, narcotics money laundering offenses have been considered to be fiscal offenses. Traditionally, several states have not extradited offenders or provided mutual legal assistance for fiscal offenses. Thus, by increasing the availability of cooperation in drug money laundering investigations, this provision is extremely important.

Unfortunately, the constitutional law of a few states requires that the courts of those states determine whether or not an offense is a political offense. At the insistence of those states, the paragraph is qualified with the statement "without prejudice to the constitutional limitations and the fundamental domestic law of the Parties." It is understood, however, that the courts of those states will be guided by the principle contained in the paragraph of not viewing Article 3 offenses as political, politically motivated or fiscal offenses.

Paragraph 11 is included to clarify that the offenses established according to the Article will be described, prosecuted and punished in accord with a Party's domestic law. It also provides that the article is not intended to change the legal defenses to those offenses.

Article 4 - JURISDICTION

Final Text:

1. Each Party:
   - (a) Shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:
     - (i) The offence is committed in its territory;
     - (ii) The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;
   - (b) May take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:
     - (i) The offence is committed by one of its nationals or by a person who has his habitual residence in its territory;
     - (ii) The offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article;
     - (iii) The offence is one of those established in accordance with article 3, paragraph 1, subparagraph (c)(iv), and is committed outside its territory with a view to the commission, within its territory, of an offence established in accordance with article 3, paragraph 1.
2. Each Party:
   - (a) Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground:
     - (i) That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or
     - (ii) That the offence has been committed by one of its nationals;
   - b) May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and

it does not extradite him to another Party.
3. This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

Comments:

Article 4 deals with a Party's obligation to establish its jurisdiction over illegal drug ofenses. The negotiators believed that it was not enough to require parties to criminalize certain conduct; Parties also had to establish their jurisdiction to prosecute those offenses. Although recognizing a variety of conceptual bases for the exertion of criminal jurisdiction, the article does not resolve the inherent question of which Party's assertion of jurisdiction is preferred when there is an overlap of competing jurisdictions. The offenses that are the subject of the Convention are for the most part international offenses. Frequently drug trafficking acts occur in more than one state and more than one state has established its jurisdiction over one or more of the acts of illicit trafficking involved. A simple example where two states both have territorially based jurisdiction is the trafficker who transports drugs from state A over the border to state B. He commits an offense in two states, both of which have a territorial basis for exerting jurisdiction. According to the provisions of Articles 3 and 4, both State A and State B, if they are Parties to the Convention, must have enacted laws criminalizing the trafficker's conduct as an offense. In State A the offender has committed an exportation offense, in State B an importation offense. Assuming that the drugs the trafficker transported were to be distributed, he has also possessed drugs with the intent to distribute them in both states. Both states must also establish jurisdiction over the acts which occurred in their territory. The article does not, however, give primacy to one or the other state's right to prosecute the offender.

Paragraph 1(a) obligates a Party to establish jurisdiction over offenses committed on its territory or aboard ships or aircraft registered under its laws or flying its flag. This provision is probably unnecessary since virtually every state has also established floating territorial jurisdiction, that is the jurisdiction of the flag or registry state over conduct onboard its ships and aircraft. The unqualified inclusion of an obligation to establish territorial and floating territorial jurisdiction does indicate a certain preference for these types of jurisdiction.

Subparagraph (b) recognizes other bases for jurisdiction. A

Party is not obligated to establish jurisdiction in the circumstances, but may do so if it chooses. The first listed is jurisdiction based on the fact that the offender is a national or habitual resident of a Party. Thus a Party may establish its jurisdiction over narcotics offenses committed anywhere in the world if committed by its nationals or habitual residents. Although the United States has the power to establish its criminal jurisdiction over acts of its nationals worldwide and has done so for certain criminal conduct, the United States has not done so for all violations involving controlled substances.

Subparagraph (b)(ii) is an important recognition of a Party's power to establish its jurisdiction over offenses of illicit traffic by sea. Thus a Party may proscribe these offenses whenever they occur without having to establish a jurisdictional nexus to the territory of the Party proscribing the offenses. Exercise of this proscriptive jurisdiction on board a foreign flag vessel, however, is limited to those situations where the enforcing Party is so authorized by the flag State. This subparagraph recognizes the jurisdiction necessary to implement the permissive provisions of Article 17. The United States recognizes this form of jurisdiction.

Subparagraph (b)(iii) recognizes as a permissive form of jurisdiction what is called the effects principle of jurisdiction, that is jurisdiction over an offense which, although committed outside the territory of the state establishing jurisdiction, has or is intended to have an effect within the territory of that state. This is an extremely important provision for the United States. We recognize jurisdiction over the person who, outside the territory of the United States, orchestrates drug trafficking acts inside the United States.

Paragraph 2 of Article 4 must be read in connection with paragraph 9 of Article 6. Paragraph 2 is included to ensure that a Party has jurisdiction to proscribe offenses and jurisdiction to prosecute those offenses when that Party refuses to extradite. Several international agreements have recognized a virtually universal jurisdiction when extradition is refused. See, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft ("Hijacking"), done at The Hague December 16, 1970, 22 U.S.T. 1641, TIAS 7192; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Sabotage"), done at Montreal September 23, 1971, 24 U.S.T. 564, TIAS 7570. These conventions include an obligation to prosecute any time extradition is refused. Noting that there are very few aircraft hijackings and aircraft sabotage offenses compared to the numerous illegal drug offenses worldwide, the negotiators agreed not to require Parties to this Convention to provide for such general jurisdiction. United States negotiators also opposed the extension of jurisdiction for philosophical and pragmatic reasons. Our policy is that drug trafficking offenses should be tried in the state injured by the trafficking, and, therefore, extradition to the injured state is far preferable to prosecution in a disinterested state. Second, a realistic appraisal of the feasibility of prosecution in a state which has not gathered the evidence in a form and procedure admissible in its courts mitigates against successful prosecution in virtually every instance.

Paragraph 2 requires a Party to establish its jurisdiction when it does not extradite an offender found in its territory because the offense occured on its territory or on board a ship or aircraft registered under its law or flying its flag. It is also required to establish its jurisdiction when it refuses to extradite an offender found on its territory because that offender is its national. Article 6, paragraph 9 imposes a complementary obligation, when extradition is refused because the offense occurred in the territory of the Party from whom extradition is requested or the offense was committed by its national, to submit the case to its competent authorities for the purpose of prosecution.

Subparagraph (b) recognizes that a Party may also establish jurisdiction over Article 3, paragraph 1 offenses when the offender is present in its territory and it refuses to extradite him for any reason. This subparagraph imposes no obligation on a party to establish its jurisdiction when it refuses extradition for reasons other than those listed in subparagraph (a).

Paragraph 3 makes clear that this article in no way prohibits a party from exercising any criminal jurisdiction allowed by its domestic law.

Article 5 - CONFISCATION

Final Text:

1. Each Party shall adopt such measures as may be necessary to enable confiscation of:

   (a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;

   (b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.

2. Each Party shall adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article, for the purpose of eventual confiscation.

3. In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

4. (a) Following a request made pursuant to this article by another Party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the Party in whose territory proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article are situated shall:

   (i) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, give effect to it; or

   (ii) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by the requesting Party in accordance with paragraph 1 of this article, in so far as it relates to proceeds, property, instrumentalities or any other things referred to in paragraph 1 situated in the territory of the requested Party.

(b) Following a request made pursuant to this article by another Party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the requested Party shall take measures to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article for the purpose of eventual confiscation to be ordered either by the requesting Party or, pursuant to a request under subparagraph (a) of this paragraph, by the requested Party.

(c) The decisions or actions provided for in subparagraphs (a) and (b) of this paragraph shall be taken by the requested Party, in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting Party.

(d) The provisions of article 7, paragraphs 6 to 19 are applicable *mutatis mutandis*. In addition to the information specified in article 7, paragraph 10, requests made pursuant to this article shall contain the following:

(i) In the case of a request pertaining to subparagraph (a)(i) of this paragraph, a description of the property to be confiscated and a statement of the facts relied upon by the requesting Party sufficient to enable the requested Party to seek the order under its domestic law;

(ii) In the case of a request pertaining to subparagraph (a)(ii), a legally admissible copy of an order of confiscation issued by the requesting Party upon which the request is based, a statement of the facts and information as to the extent to which the execution of the order is requested;

(iii) In the case of a request pertaining to subparagraph (b), a statement of the facts relied upon by the requesting Party and a description of the actions requested;

(e) Each Party shall furnish to the Secretary-General the text of any of its laws and regulations which give effect to this paragraph and the text of any subsequent changes to such laws and regulations.

(f) If a Party elected to make the taking of the measures referred to in subparagraphs (a) and (b) of this paragraph conditional on the existence of a relevant treaty, that Party shall consider this Convention as the necessary and sufficient treaty basis.

(g) The Parties shall seek to conclude bilateral and multilateral treaties, agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article.

5. (a) Proceeds or property confiscated by a Party pursuant to paragraph 1 or paragraph 4 of this article shall be disposed of by that Party according to its domestic law and administrative procedures.

(b) When acting on the request of another Party in accordance with this article, a Party may give special consideration to concluding agreements on:

(i) Contributing the value of such proceeds and property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances;

(ii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.

6. (a) If proceeds have been transformed or converted into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

(b) If proceeds have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to seizure or freezing, be liable to confiscation up to the assessed value of the intermingled proceeds.

(c) Income or other benefits derived from:

(i) Proceeds;

(ii) Property into which proceeds have been transformed or converted; or

(iii) Property with which proceeds have been intermingled

shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds.

7. Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.

8. The provisions of this article shall not be construed as prejudicing the rights of *bona fide* third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.

Comments:

Article 5 embraces two sets of obligations. First, each Party must enact domestic laws to enable it to identify, trace, seize, freeze, and forfeit all manner of property derived from or used in offenses established in accordance with Article 3, paragrah 1, that is all drug trafficking and money laundering offenses therein described. Second, the article requires each Party to assist other Parties upon request to identify, trace, seize, freeze or forfeit proceeds, property, instrumentalities or any other things within its territory that was used or intended for use in Article 3, paragraph 1 offenses in the territory of the requesting Party. For many of the countries that participated in the negotiation of this Convention, the provisions of this article are innovative.

The article is titled "Confiscation" and the term "confiscation" is used throughout rather than the term "forfeiture". Confiscation was chosen because that is the term used in the Single and Psychotropic Substances Conventions 1/ and because this is the term used by many European countries in their forfeiture laws. The term is synonymous with the term forfeiture used in U.S. law.

Paragraph 1 contains a broad obligation upon Parties to take whatever measures are necessary to forfeit all proceeds derived from drug trafficking or money laundering offenses as well as all instrumentalities used in or intended for use in those offenses. Subparagraphs (a) and (b) are intended to include all forms of property that might be used or intended for use in or derived from the covered offenses. It includes the drugs themselves as well as materials, equipment or other instrumentalities. Further, subparagraph (a) allows the option of forfeiting either the proceeds of the offenses or, in their place, property which has a corresponding value.2/

1/ Article 37 of the Single Convention states "[a]ny drugs, substances and equipment used in or intended for the commission of any of the offenses, referred to in article 36, shall be liable to seizure and confiscation." Article 22[3] of the Psychotropic Substances Convention contains a similar provision on the seizure and confiscation of psychotropic substances and equipment.

2/ Title 21, U.S.C. Section 853 and Title 18, U.S.C. Section 982 provide for the same possibility under the "substitute assets" provisions.

The law of the United States provides for the forfeiture of all categories of property contained within paragraph 1.[3] In addition, as noted above, U.S. forfeiture law provides for the substitution of assets in criminal forfeiture.[4]

Paragraph 2 requires Parties to take the necessary measures to allow their authorities to identify, trace, seize or freeze proceeds, property, instrumentalities or any other thing as the necessary preliminary steps toward the eventual forfeiture of that property.

Paragraph 3 obligates each Party to empower its courts or other authorities to order the production of or to seize business records, including bank records, needed to trace, identify, seize, and forfeit proceeds or instrumentalities. This paragraph includes an affirmative obligation on each Party to ensure that bank secrecy laws are not permitted to shield from discovery any of the requested materials needed to perfect the forfeiture order. This provison and a similar provision in Article 7, paragraph 5 are intended to prevent bank secrecy laws from obstructing either forfeiture proceedings or the investigation and prosecution of trafficking offenses. These provisions are among the most important in the Convention.

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[3] The laws of the United States include both civil and criminal forfeiture statutes. Title 21, United States Code, Section 881 subjects all controlled substances, proceeds derived from a controlled substances violation and instrumentalities used in or intended for use in a controlled substances violation to civil forfeiture. Title 21, United States Code, Section 853 provides that a person convicted of a Controlled Substances Act felony shall forfeit all proceeds derived from that felony and any property used in or intend for use in the commission of such felony. Title 18, United States Code, Section 981 provides that the gross receipts of a money laundering offense in violation of Title 18, United States Code, Sections 1956 or 1957 shall be subject to civil forfeiture.

[4] Section 853(p) of Title 21 provides that if any of the property subject to criminal forfeiture pursuant to the provisions of Section 853 "(1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantialy diminished in value; or (5) has been commingled with other property which cannot be divided with difficulty; the court shall order the forfeiture of any other assets of the defendant up to the value of any property described in paragraphs (1) to (5)." Section 982 of Title 18 incorporates the provision on substitution of assets in Section 853(p) of Title 21 to the forfeiture of property involved in money laundering offenses.

Paragraph 4(a) establishes two procedures for parties to seek assistance from other parties to forfeit proceeds or instrumentalities located in the requested Party's territory. The two alternative procedures reflect the different legal approaches to forfeiture taken by different states. Alternative (a)(i) provides for the initiation of a forfeiture proceeding in the requested Party based upon the information provided by the requesting Party. Alternative (a)(ii) is an *exequatur*-type proceeding in which the requested Party gives, in essence, full faith and credit to a forfeiture order duly entered in the requesting Party. It was universally agreed among the negotiators that Parties should be obligated to assist one another by forfeiting the proceeds of trafficking found within their borders. The difficulty presented was to ensure that Parties that used different procedures could avail themselves of one another's legal system. Although the traditional rule was that one country would not enforce the criminal judgments, including forfeiture judgments of another country, some countries, in particular the United Kingdom, have enacted laws that permit them under certain circumstances to recognize and enforce a foreign forfeiture judgment.[5] Usually this judgment of forfeiture must be a final criminal judgment and is considered enforceable against any of the offender's assets. Other countries are unable to enforce a foreign criminal judgment of forfeiture, but are able to proceed *in rem* against the proceeds or instrumentalities if a sufficient factual basis is provided to establish, to the satisfaction of its courts or other competent authorities, that the property is the proceeds or instrumentalities of trafficking offenses.

Recently enacted legislation in the United States expands the authority of the United States to forfeit the proceeds of foreign drug trafficking crimes. Title 18, United States Code Section 981(a)(1)(B) allows the forfeiture of property located within the United States "which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act) within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States."

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[5] Drug Trafficking Offenses Act of 1986, Section 26.

Section 981 does not grant authority to forfeit instrumentalities used in or intended for use in foreign drug trafficking crimes. To fully implement Article 5 paragraph 4, Section 981 should be amended to include forfeiture of the instrumentalities of foreign drug offenses.

Subparagraph (b) requires Parties to assist one another in those proceedings leading to the forfeiture of the proceeds and instrumentalities of illicit trafficking. This provision is particularly important because it represents an international recognition of a change in the traditional rule that no state is obligated to aid another in the execution of penal laws respecting the enforcement of fines or forfeiture of criminal assets. U.S. law currently allows such assistance.

Section 1782 of Title 28, United States Code, empowers U.S. courts to order persons "to give . . . testimony or statements or to produce a document or other things for use in a proceeding in a foreign or international tribunal." This broad grant of authority to assist foreign tribunals is limited only in that a person may not be compelled to testify or to produce a document or other things in violation of any legally applicable privilege. Section 981(c) of Title 18 empowers the Attorney General or the Secretary of the Treasury to seize and retain in their custody any property subject to forfeiture as the proceeds of a foreign drug felony pursuant to Section 981(a)(1)(B) pending final outcome of the forfeiture proceedings.

Subparagraph (c) states that the actions to be taken for forfeiture and the forfeiture decision shall be taken by the requested Party according to its domestic law, procedural rules and any treaties, agreements or arrangements to which it is a party. Thus, although a Party is obliged to assist another party to trace, identify, seize, freeze and forfeit proceeds and instrumentalities, it does so according to its own domestic laws and procedures. The article does not require Parties to make any changes in their substantive or procedural laws on forfeiture except to the extent necessary to allow the international assistance contemplated in subparagraphs (a) and (b). The burden of proof, notice requirements, and defenses to forfeiture are determined exclusively by domestic law. This subparagraph must be read, however, in conjunction with paragraph 3 which requires Parties to empower their courts to pierce bank secrecy. Subparagraph (c) does not permit a party to prevent either forfeiture proceedings or the antecedent proceedings that lead up to forfeiture because of their domestic bank secrecy laws.

Subparagraph (d) details the information to be included in a request for forfeiture assistance. It was the intent of the negotiators that subparagraph (d) provide guidance to Parties as to what information a requested party would need in order to execute a request. The subparagraph includes by reference the procedures outlined in the article on mutual legal assistance. In addition it provides for inclusion in the request of the specific information needed to execute a request for forfeiture. Once more the negotiators attempted to accommodate the two major approaches taken to international forfeiture. Subparagraph (i) describes the information which must be provided in a request to a Party that must initiate forfeiture proceedings by establishing the basis for forfeiture by presenting the facts of the foreign investigation. Subparagraph (ii) describes the information needed in the request if the request is to be executed by a party which is empowered by its law to recognize and give effect to a foreign forfeiture order.

Subparagraph (iii) lists the information that must be included in the request if the requesting Party is seeking assistance in identifying, tracing, seizing or freezing property.

Subparagraph (e) requires each Party to provide the Secretary General with copies of its laws and regulations governing forfeiture. This provision was included to enable the Secretary General, through his designee, to provide a clearing house of information on national forfeiture laws and regulations. The Single Convention and the Psychotropic Substances Convention have similar provisions.[6]

Paragraph (f) is an affirmative statement that if a treaty basis is necessary for a Party to assist another Party to identify, trace, seize, freeze and forfeit proceeds and instrumentalities, then this Convention provides the necessary and sufficient treaty basis. This paragraph can be contrasted to paragraph 3 of the Article 6. In Article 6, paragraph 3, Parties that need a treaty basis for extradition are given the option of considering the Convention as a sufficient basis.

Paragraph (g) recognizes that it is possible to improve on the provisions for cooperation in forfeiture through other agreements, treaties or arrangements. Parties are, therefore, directed to seek to conclude such agreements. It is the policy reflected in our law and our drug strategy that the government seek to conclude treaties and other agreements that facilitate international forfeiture.

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[6] See Article 18(i)(b), Single Convention; Article 16(a), Psychotropic Substances Convention.

Paragraph 5 addresses the question of what happens to the proceeds and property forfeited by a Party. After lengthy debate it was agreed that the disposal of forfeited assets would be determined by the law of the Party which confiscated those assets. Thus, the general rule stated in this paragraph is that each country shall dispose of assets it forfeits, either as proceeds or property of a domestic offense or at the request of another Party, according to its own domestic law or regulations on the disposition of forfeited assets. Many states, however, wanted to encourage sharing of forfeited assets either among the countries involved in the investigation and prosecution of the trafficking offenses or among Parties injured by the trafficking. Other countries, Brazil in particular, wanted to encourage Parties to contribute some or all of the forfeited assets to intergovernmental bodies such as United Nations Fund for Drug Abuse Control. Subparagraph (b) was included to encourage Parties to consider such contributions. The subparagraph imposes no obligation on a Party to share or to consider sharing, but does recognize that a Party may give special consideration to concluding agreements on such sharing. This provision is consistent with Title 18, United States Code, Section 981(i) which authorizes the Attorney General, with concurrence of the Secretary of State, equitably to transfer property forfeited under the Controlled Substances Act to a foreign state, with which the U.S. has entered into an agreement, to reflect generally the contribution of that foreign country's participation in any acts which led to the seizure or forfeiture of the property. Title 19, U.S.C. Section 1616a(c)(2) authorizes the Secretary of the Treasury to make similar transfers of property under Title 18, Title 31 and the customs laws.

Paragraph 6 was included to ensure that proceeds derived from and instrumentalities used in illegal trafficking could not escape forfeiture simply because their form had been changed or they had been commingled with other property. The fact that property had been converted, transformed or intermingled with legitimate property does not defeat its forfeiture. Subparagraph (c) provides that income or other benefits derived from illegally obtained proceeds or property shall also be forfeitable. This mirrors U.S. law which permits the forfeiture of property or property traceable thereto.

Paragraph 7 recognizes that some Parties reverse the burden of proof as to the origin of property subject to forfeiture. The paragraph does not require Parties to do so, but merely recognizes that if consistent with its domestic law, a Party may reverse the burden of proof. U.S. forfeiture laws which reference customs laws and procedures provide for the inversion of the burden of proof in some cases.

Paragraph 8 states that the provisions of the article shall not affect the rights of _bona fide_ third parties. The paragraph does not attempt to define those rights. The rights of _bona fide_ third parties are defined by the domestic law of each Party. Thus, this paragraph simply states that it was not the intention of the negotiators to inadvertently change the rights _bona fide_ third parties have under the domestic law of a Party.

Paragraph 9 states that measures to be taken pursuant to this article shall be defined and implemented according to the domestic law of each Party.

Article 6 - EXTRADITION

Final Text:

1. This article shall apply to the offences established by the Parties in accordance with article 3, paragraph 1.

2. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

3. If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. The Parties which require detailed legislation in order to use this Convention as a legal basis for extradition shall consider enacting such legislation as may be necessary.

4. The Parties which do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds upon which the requested Party may refuse extradition.

6. In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment or any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.

7. The Parties shall endeavor to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

8. Subject to the provisions of its domestic law and its extradition treaties, the requested Party may, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the requesting Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his presence at extradition proceedings.

9. Without prejudice to the exercise of any criminal jurisdiction established in accordance with its domestic law,

a Party in whose territory an alleged offender is found shall:
(a) If it does not extradite him in respect of an offence established in accordance with article 3, paragraph 1, on the grounds set forth in article 4, paragraph 2, subparagraph (a), submit the case to its competent authorities for the purpose of prosecution, unless otherwise agreed with the requesting Party;
(b) If it does not extradite him in respect of such an offence and has established its juridiction in relation to that offence in accordance with article 4, paragraph 2, subparagraph (b), submit the case to its competent authorities for the purpose of prosecution, unless otherwise requested by the requesting Party for the purposes of preserving its legitimate jurisdiction.

10. If extradition, sought for the purposes of enforcing a sentence, is refused because the person sought is a national of the requested Party, the requested Party shall, if its law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence which has been imposed under the law of the requesting Party, or the remainder thereof.

11. The Parties shall seek to conclude bilateral and multilateral agreements to carry out or to enhance the effectiveness of extradition.

12. The Parties may consider entering into bilateral or multilateral agreements, whether and hoc or general, on the transfer to their country of persons sentenced to imprisonment and other forms of deprivation of liberty for offences to which this article applies, in order that they may complete their sentences there.

COMMENT

The article on extradition was one of the most difficult to negotiate. The negotiators wanted to go further than had been done in previous multilateral treaties on criminal offenses, but found it virtually impossible to accommodate the widely differing legal systems among over one hundred States. Many States saw extradition, particularly of their own nationals, to be directly tied to their concepts of sovereignty. Most wanted to retain some form of discretion as to whether or not they would extradite an offender to certain countries whose legal or political systems they distrusted.

The United States had hoped to include a broad obligation to extradite one's own nationals in this article. Unfortunately there was overwhelming opposition from countries which, for either political or legal reasons, would not accept any provision on the extradition of their nationals, even a hortatory provision. Thus, the article contains no provision on the extradition of nationals.

The structure of the first four paragraphs parallels similar provisions in the Single Convention and in the Psychotropic Substances Convention as well as language in other multilateral conventions on criminal conduct.[1] These provisions are designed to ensure that the criminal conduct which is the subject of those conventions is considered extraditable conduct by the Parties, whatever the nature of their extradition relationship.

Paragraph 1 defines the scope of the criminal conduct which is covered by the article. The article applies to all Article 3, paragraph 1 offenses. The negotiators intended that this provision would have a twofold effect. First, it ensures that all Article 3 paragraph 1 offenses are considered by all Parties to be extraditable offenses. Because all Parties are obligated to establish Article 3, paragraph 1 offenses as criminal offenses in their domestic law, any requirements of dual criminality, that is that the offense is criminal in both jurisdictions, in a Party's extradition law should be met. Although there has been almost universal recognition that illicit drug trafficking offenses are extraditable offenses, narcotics related money laundering is a new criminal offense for many states and has not been traditionally recognized as an extraditable offense. The universal recognition of narcotics related money laundering as an extraditable offense is one of the most important aspects of this article.

Paragraph 1 also limits the scope of the article by eliminating from the scope of its applicability offenses which are clearly outside the purview of the Convention. Thus it states the obvious - that the provisions of the article to not apply to fraud offenses for example. It also excludes article 3, paragraph 2 offenses, thus excluding possession, cultivation and purchase for personal use. Because the United States negotiators believed that this Convention should focus on international drug traffic, they agreed to eliminate the numerous small offenses. Many of these offenses are punishable by terms of imprisonment of less than 1 year.[2] Traditionally, most extradition treaties do not cover offenses punishable by a term of imprisonment of less than 1 year.

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[1] Article 36(2)(b), Single Convention; Article 22(2)(b), Psychotropic Substances Convention; *see also* Article 8(1)-(3), Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) of December 16, 1970, 22 U.S.T. 1641; Article 8(1)-(3), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) of September 23, 1971, 24 U.S.T. 564.

[2] *See* 21 U.S.C. 844(b).

Paragraph 2 amends existing bilateral treaties between Parties to include article 3, paragraph 1 offenses and requires Parties to include such offenses as extraditable offenses in all future extradition treaties between them. Extradition from the United States is conditional on the existence of a bilateral extradition treaty between the requesting country and the United States. That bilateral treaty may be amended by a multilateral treaty to include additional offenses. This provision is consistent with our law interpreting a simiar provision in the Single Convention.[3/] It is also consistent with our policy to include illegal drug and money laundering offenses as extraditable offenses in all future extradition treaties to be negotiated.

Paragraph 3 recognizes that a Party which requires a treaty basis for extradition may consider this Convention as that required basis. Although this provision will provide other States a sufficient legal basis for extradition, U.S. extradition law and practice requires a bilateral treaty.

The final sentence of paragraph 3 requires a Party which needs detailed legislation to use the Convention as an extradition treaty to consider enacting such legislation. This provision is a new one not contained in any of the other multilateral criminal conventions. It is an obligation only to consider, not necessarily to enact, such legislation. The obligation is inapplicable to the United States because our inability to use this Convention as the basis for extradition in the absence of bilateral treaty is based, not on the absence of detailed legislation, but on our case law and the provisions of our extradition statute.

Paragraph 4 requires Parties which do not require a treaty basis for extradition to recognize article 3 paragraph 1 offenses as extraditable offenses between themselves. This paragraph does not apply to the United States.[4/]

3/ See Arnbjornsdottir-Mendler v. United States, 721 F.2d 679 (9th Cir. 1983) (extradition to Iceland based on old US/Denmark Treaty and Single Convention). The Single Convention has been very useful to supplement old bilateral treaties which do not require the extradition of drug offenders. For instance our current extradition treaty with Costa Rica which was negotiated at the turn of the century does not cover drug offenses. Nevertheless the United States and Costa Rica are parties to the Single Convention and its 1972 Protocol. We have obtained more than 20 drug offenders from Costa Rica since 1982.

4/ See 18 U.S.C. 3181, 3184.

Paragraph 5 states that extradition shall be subject to the law of the Requested Party. The extradition procedures, the standard of proof, and the defenses to extradition are to be defined exclusively by the domestic law of the requested party. Paragraph 5 must be read, however, together with Article 3, paragraph 10 which amends bilateral extradition treaties to preclude the denial of extradition on the grounds that Article 3, paragraph 1 offenses are "fiscal", "political", or "politically motivated" offenses.

Paragraph 6 grants discretion to refuse extradition to the requested party if that party believes that there are substantial grounds to believe that the extradition would facilitate prosecution or punishment for human or civil rights reasons. This paragraph must be read together with paragraph 5. Thus it does not change the defenses to extradition under United States law.

The United States delegation clarified on the record of the Conference, through a statement of explanation, that the use of the phrase "judicial or other competent authorities" in this paragraph grants Parties full discretion to determine for themselves, consistent with their domestic law, which branch of government, whether judicial, executive or legislative, is charged with making the decision to refuse extradition for humanitarian reasons. In some states, such as the United States, the relevant procedural law reserves the decision with regard to human rights to the Executive Branch of Government. There was no indication at the negotiations of any intent to require some states to alter their procedures in order to conform them to the procedures followed by others. Such an intent would be inconsistent with the intent of the Article, as explicitly mentioned in paragraph 7, which is to expedite as much as possible the extradition process for serious drug traffickers. Consistent with this spirit the committee adopted paragraph 5 which reserves the right of each party to determine the procedure to be followed within that party. Thus paragraph 6 does not alter the procedural law of the United States concerning the mechanism by which such decisions are made. Humanitarian defenses to extradition remain the province of the Executive Branch, in particular the Secretary of State.5/ See Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980); Peroff v.

5/ Some United States extradition treaties do provide that extradition may be refused for humanitarian grounds. See e.g. U.S./Finland treaty, TIAS 9626; United States/Sweden treaty, TIAS 5496. The provisions of those treaties clearly refer to the power of the executive branch of government, the branch which is responsible for negotiating and implementing the underlying treaty, to deny extradition based upon such humanitarian appeals.

Hylton, 542 F.2d 1247 (4th Cir. 1976); In Re Lincoln, 228 F. 70 (E.D.N.Y. 1915), aff'd per curiam 241 U.S. 651 (1915).

Paragraph 7 contains a general hortatory provision encouraging Parties to attempt to simplify and expedite extradition procedures. This provision must be read in the context of a Party's domestic law. Thus for the United States, this paragraph contains no necessity of simplifying our evidentiary requirement of probable cause, but only that within the framework of that requirement, the United States should endeavor to simplify, if possible, our procedures. The United States fulfills this requirement in its ongoing efforts to negotiate new modern treaties.

Paragraph 8 is a permissive grant of authority to a Party to arrest provisionally and hold without bond a person whose extradition is sought pending the formal request for his extradition. This provision is subject to domestic law and bilateral treaties of a party. Title 18, United States Code, Section 3184 provides the statutory authority for the provisional arrest of a fugitive in the United States. This provision is dependent on the existence of a bilateral treaty. United States case law holds that bail is granted in extradition cases only upon a showing of special circumstances. Wright v. Henkel, 190 U.S. 40 (1903).

Paragraph 9 imposes an obligation on a Party to submit the case to its competent authorities for the purpose of prosecution if extradition is refused for certain circumstances. The paragraph must be read in tandem with Article 4, paragraph 2 which obligates Parties to extend their jurisdiction in certain instances when extradition is refused. This provision is an extradite or prosecute provision commonly referred to in civil law states as aut dedere aut judicare. Subparagraph (a) of paragraph 9 first imposes an obligation to submit for prosecution if extradition is refused because the offenses involved occurred on the territory of the Requested Party or onboard a ship or aircraft registered under its law. The existence of United States territorial jurisdiction is not a ground for refusal of extradition under United States law. The second obligation to submit for prosecution occurs in those instances where extradition is refused because the offender is a national of the requested Party. The Supreme Court has held that the United States may extradite its nationals only in the absence of any limiting language in a bilateral treaty. Charlton v. Kelly, 229 U.S. 447 (1913). However, if an extradition treaty contains language which limits that authority, e.g., "neither party shall be bound to deliver up its own citizens", the Court has held that U.S. nationals may not be extradited unless the treaty also contains a positive grant of authority to surrender U.S. citizens. Valentine v. United States ex rel Neidecker, 299 U.S. 5, 7-12 (1936). Post-Valentine extradition treaties of the United States contain language such as "[N]either of the contracting Parties shall be bound to deliver up its own citizen under the stipulations of this Convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it is deemed proper to do so." (Emphasis added). Such a clause contains the necessary positive grant of authority to the Executive to extradite United States citizens.

Although all post-Valentine treaties contain such a clause, the United States does have several pre-Valentine treaties still in force that contain the limitation but lack the requisite grant of authority. In those rare instances, the United States, although obligated under a bilateral treaty to extradite, would be forced to refuse to extradite based on the nationality of the offender. Absent a statutory grant of discretion to the executive to extradite U.S. nationals, subparagraph (a) will obligate the United States to submit such cases to our competent authorities for the purpose of prosecution.

Since we would not have extraterritorial jurisdiction to prosecute such cases, to avoid an obligation to perform a pointless act, it is the Administration's intention to remedy the Valentine problem by seeking legislation to amend this class of treaties with an affirmative grant of discretion to surrender U.S. nationals. Unless this is done, we will be obligated under Article 4, paragraph 2(a)(ii) to establish extraterritorial jurisdiction to prosecute U.S. nationals here for Article 3(1) offenses committed abroad, in those situations in which we cannot extradite to a requesting country because of the Valentine problem. In view of the general U.S. policy favoring extradition of nationals to the country where the greatest harm has been suffered because of the commission of criminal acts, and against creating "universal" jurisdiction, we believe it preferable to eliminate the situations in which we cannot extradite our nationals rather than create jurisdiction to prosecute them because we cannot extradite them.

Subparagraph (b) provides for a broader obligation to submit a case for prosecution when extradition is refused for any reason if the Party requested has established its jurisdiction to prosecute pursuant to the provisions of Article 4, paragraph 2, subparagraph (a). Thus if a Party has chosen to extend its jurisdiction to allow it to prosecute whenever the person who committed the offense is within its territory and extradition is refused for any reason, it is required to submit the case to its competent authorities for the purpose of prosecution. This provision does not apply to the United States because we do not recognize such a broad extension of our jurisdiction.

The obligations to submit a case to one's competent authorities for the purpose of prosecution contained in both subparagraphs (a) and (b) are qualified. Subparagraph (a) limits the obligation by the phrase "unless otherwise agreed to by the Parties". Subparagraph (b) limits the obligation by the phrase "unless otherwise requested by the requesting party for the purposes of preserving its legitimate jurisdiction." Both limiting clauses were included at the request of the United States negotiators in order to allow the requesting Party to have some say in whether or not prosecution would occur by the Requested Party. The requested party might prefer to retain the option of being able to extradite later from a third state, rather than having the offender prosecuted by the requested Party. The right of the requesting Party to block prosecution is more extensive in subparagraph (b) because the extension of jurisdiction in subparagraph (b) is more tenuously related to traditional concepts of criminal jurisdiction.

Paragraph 10 obligates parties whose domestic law so permits to enforce a foreign sentence when extradition is sought for the enforcement of that sentence and extradition is refused because the offender is a national of the requested country. United States law does not permit the enforcement of a foreign sentence when extradition is refused. Therefore this paragraph is not applicable to our domestic extradition practice.

Paragraph 11 calls upon Parties to seek to conclude other agreements to facilitate extradition. This provision is consistent with United States policy of continuing to negotiate modern extradition treaties.

Paragraph 12 is a permissive provision aimed at encouraging Parties to enter into prisoner transfer treaties. The United States has entered into a number of these treaties in the last ten years.

Article 7 - MUTUAL LEGAL ASSISTANCE

Final Text:

1. The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.

2. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
   (a) Taking evidence or statements from persons;
   (b) Effecting service of judicial documents;
   (c) Executing searches and seizures;
   (d) Examining objects and sites;
   (e) Providing information and evidentiary items;
   (f) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records;
   (g) Identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

3. The Parties may afford one another any other forms of mutual legal assistance allowed by the domestic law of the requested Party.

4. Upon request, the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.

5. A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual legal assistance in criminal matters.

7. Paragraphs 8 to 19 of this article shall apply to requests made pursuant to this article if the Parties in question are not bound by a treaty of mutual legal assistance. If these Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 8 to 19 of this article in lieu thereof.

8. Parties shall designate an authority, or when necessary authorities, which shall have the responsibility and power to execute requests for mutual legal assistance or to transmit them to the competent authorities for execution. The authority or the authorities designated for this purpose shall

be notified to the Secretary-General. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the authorities designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through channels of the International Criminal Police Organization, if possible.

9. Requests shall be made in writing in a language acceptable to the requested Party. The language or languages acceptable to each Party shall be notified to the Secretary-General. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith.

10. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or proceeding to which the request relates, and the name and the functions of the authority conducting such investigation, prosecution or proceeding;

(c) A summary of the relevant facts, except in respect of requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure the requesting Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned;

(f) The purpose for which the evidence, information or action is sought.

11. The requested Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

12. A request shall be executed in accordance with the domestic law of the requested Party and, to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.

13. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

14. The requesting Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party.

15. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

16. Reasons shall be given for any refusal of mutual legal assistance.

17. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary.

18. A witness, expert or other person who consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting Party, shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory of the requested Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days, or for any period agreed upon by the Parties, from the date on which he has been officially informed that his presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory or, having left it, has returned of his own free will.

19. The ordinary costs of executing a request shall be borne by the requested Party, unless otherwise agreed by the Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the request will be executed as well as the manner in which the costs shall be borne.

20. The Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purpose of, give practical effect to, or enhance the provisions of this article.

Comments:

Article 7 is a miniature mutual legal assistance treaty (or "MLAT"). The wide differences in the methods of developing admissible evidence in the varied legal systems of the states which participated in the negotiations of this article made it impossible to negotiate as detailed and comprehensive provisions as are often found in bilateral mutual legal assistance treaties. Therefore, the article focuses on key elements of mutual legal assistance relations but omits many detailed procedures for implementing those relations. Many details are left to the Parties involved to formulate on a case by case basis.

The most important aspect of Article 7 is that it establishes a treaty obligation upon a Party to provide mutual legal assistance to another Party in the investigation, prosecution or other judicial proceedings in relation to article 3 paragraph 1 offenses. Absent such a treaty obligation, mutual legal assistance between countries has been solely a matter of comity.

The article simplifies and codifies the procedures for mutual legal assistance between Parties which are not Parties to more detailed and comprehensive multilateral or bilateral treaties on mutual legal assistance. It also amends existing mutual legal assistance treaties to the extent necessary to include an obligation to provide assistance for all article 3, paragraph 1 offenses, thereby including money laundering in the context of illegal drug trafficking. Like the parallel provision in the article on extradition, the inclusion of drug-related money laundering with the offenses for which assistance is to be given is an important expansion of traditional mutual assistance relations.

There is a deliberate overlap between the provisions of Article 7 and of Article 9, titled "Other Forms of Cooperation and Training." Because of the wide variance among the different countries as to which forms of assistance can be provided directly by law enforcement officials and which forms require compulsory measures taken by a court or other judicial authority, the issue was left unresolved. For example, the United States permits the statement of a person who consents to be interviewed to be taken without a court order. Other countries require all statements be taken only upon order of their courts. A Party is obligated, however, to provide assistance requested pursuant to this article to the extent made possible by its legal system in the simplest fashion. It was understood that, except for the assistance identified in paragraph 2, Article 7 did not apply to existing or future agreements or arrangements concerning law enforcement assistance.

The Convention separates mutual legal assistance in forfeiture proceedings from such assistance in criminal investigations and prosecutions. Rather than including international assistance in forfeiture proceedings in Article 7, provision for such assistance is included in the article on confiscation, Article 5. Article 5, however, incorporates many of the procedural provisions of Article 7 by reference. The placement of mutual legal assistance for forfeiture proceedings outside the mutual legal assistance article was done solely to emphasize the importance of forfeiture assistance and not to change mutual assistance law.

Article 7 is consistent with United States law, codified in Title 28, United States Code, Section 1782, which grants broad power to United States courts to execute foreign requests for mutual legal assistance. No implementing U.S. legislation is necessary. The article is self-executing.

Paragraph 1 sets forth the general obligation of the Parties to provide legal assistance to one another. It was the intent of the negotiators that this obligation would be described as broadly as possible. The language used is taken from article 1(a) of the European Convention on Mutual Legal Assistance in Criminal Matters.[1] The reference to all "investigations, prosecutions and other judicial proceedings" is intended to include all criminal proceedings except forfeiture, including such proceedings as bail hearings, probation revocation hearings and grand jury investigations. The use of the term "investigations" is somewhat unclear. Some States, including in particular Austria, noted a reservation to an obligation to provide mutual legal assistance to purely police investigations.

Paragraph 2 contains an illustrative but not exhaustive list of the types of mutual legal assistance a Party may request pursuant to this article. These types of assistance are consistent with the types of assistance covered in United States bilateral treaties.[2]

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[1] European Treaty Series No. 130, entered into force June 12, 1962.

[2] See, e.g., Article 21, U.S.-Turkey Treaty on Extradition and Mutual Assistance in Criminal Matters, signed at Ankara on June 7, 1979, 32 UST 311, TIAS 9891 (entered into force Jan. 1, 1981); Article 1, U.S.-Italy Mutual Legal Assistance Treaty signed at Rome November 9, 1982, TIAS ____ (entered into force Nov. 13, 1985); Article 1, U.S.-Netherlands Treaty on Mutual Assistance in Criminal Matters, signed at the Hague June 12, 1981, TIAS 10734 (entered into force Sept. 15, 1943).

Paragraph 3 provides that other forms of mutual legal assistance than those listed in paragraph 2 may be provided if permitted by the domestic law of a Party. This paragraph is an affirmative statement that the list in paragraph 2 is not intended to restrict a Party's domestic practice of providing additional assistance.

Paragraph 4 creates an obligation to facilitate or encourage the testimony of a witness from the requested Party in the territory of the requesting Party only to the extent permitted by a Party's domestic law and practice. Additionally, this obligation exists only when the witness consents to travel to and testify in the requesting Party's territory. The paragraph includes persons in custody. Not only is this paragraph intended to provide the legal basis for cooperation in these matters, but also to encourage Parties to simplify any obstacles to such travel as, for example, the witness's need for travel documents or permission to travel. The obligation is conditioned on the request of a Party. Therefore, there is no obligation on the requested Party to facilitate the travel of a person in custody in its territory, who demands permission to travel to another country to be present at a deposition being taken there in connection with his criminal case.

Paragraph 5 forbids a Party from refusing to execute a request for mutual legal assistance on the ground of its bank secrecy law. This provision was considered very important by the negotiators since it represents an affirmative statement that bank secrecy laws shall not be used as a ground for denying assistance. It is intended to apply not only to a request made according to the procedures set forth in the article, but also to modify any existing or future mutual legal assistance treaties. Thus, bank secrecy laws alone cannot be imposed to block assistance.

Paragraph 6 resolves the differences between this article and other mutual legal assistance treaties, many of which are more comprehensive than Article 7. The paragraph clearly states that Article 7 cannot be construed to lessen any existing or future obligation to provide mutual legal assistance pursuant to any bilateral or multilateral mutual legal assistance treaties between Parties. This paragraph does not, however, eliminate the obligation of a Party to provide assistance for Article 3(1) offenses even if there is a bilateral treaty between them. If the bilateral treaty does not include an obligation to provide assistance for Article 3(1) offenses, in particular the money laundering offense described in Article 3(1)(c), Article 7 amends that treaty to include an obligation to assist in the investigation, prosecution or other judicial proceedings in relation to that offense. In addition, paragraph 6 does not limit the obligation found in paragraph 5 not to impose bank secrecy laws to prevent the execution of a request.

Paragraph 7 is designed to ensure that the procedural paragraphs, paragraphs 8 to 19, only apply if either there is not a mutual legal assistance treaty between the Parties involved or if the Parties, although bound by a mutual assistance treaty, elect to use the procedural paragraphs of the Article. This paragraph reflects the consensus of the negotiators that treaties solely on mutual legal assistance, whether bilateral or multilateral, contain simpler, more effective procedural provisions than Article 7. This consensus was based on the realization by the negotiators that because of the number of countries participating in the negotiations, their widely varying legal systems, the differing levels of experience in providing mutual legal assistance of the countries, and insufficient time to negotiate a full mutual assistance treaty within the Convention, any bilateral and many multilateral mutual legal assistance treaties are likely to be more effective and comprehensive.

Paragraph 8 has two parts. First, it requires Parties to designate an authority or authorities with the power to execute requests and to notify the Secretary General of that authority. United States negotiators wanted the paragraph to require each Party to designate a single authority rather than allow for more than one.3/ Unfortunately, a number of countries were adamant that it was politically impossible for them to designate a single authority. The paragraph therefore allows a party to designate more than one authority. A positive aspect of this provision is that it will allow countries which have dependent territories to designate a separate authority for that territory, thereby

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3/ In the United States, the appropriate authority is the Attorney General as is the case in other mutual legal assistance treaties. The Attorney General has delegated his duties as Central Authority under mutual legal assistance treaties to the Assistant Attorney General in charge of the Criminal Division, pursuant to 28 C.F.R § 0.64-1. The Assistant Attorney General for the Criminal Division has in turn re-delegated his authority to the Deputy Assistant Attorney General and to Director of the Criminal Division's Office of International Affairs, in accordance with the regulation. Directive No. 81, 44 FR 18661, March 29, 1979, as amended at 45 FR 7541, January 29, 1980; 48 FR 54595, December 6, 1983.

allowing communication directly with the territorial authority which will actually execute or supervise the execution of the request.

The second important aspect of this paragraph is that it encourages direct communication between authorities designated by the Parties. Unfortunately, it also permits a Party to require another Party to communicate through diplomatic channels, a much more time consuming and cumbersome procedure. The paragraph allows communication through INTERPOL channels if the Parties agree and the circumstance are urgent.

Paragraph 9 resolves the question of which Party chooses the language of the request by granting the choice to the requested Party. It also imposes a general obligation that the request be in writing but allows an exception when the Parties so agree, the circumstances are urgent, and the request is reduced to writing immediately thereafter. Finally, the paragraph provides for a notice provision through the Secretary General of what language or languages a Party will require requests to it to be in. This Article is consistent, in general, with our mutual legal assistance treaties and allows the United States to require that any request to it be in English.

Paragraph 10 defines the basic contents of a request. The list is a practical list of information that the negotiators believed would be needed by the requested Party to be able to execute the request. Paragraph 11 clarifies that additional information may be requested by the requested Party if needed to execute the request or to facilitate such execution.

Paragraph 12 is critically important. It provides that all requests shall be executed in accordance with the domestic law of the requested Party. Thus this pragraph makes clear that the requested Party is not required to take any action pursuant to the request which would be prohibited under its law. The exception to this provision is provided by paragraph 5. Bank secrecy laws cannot be imposed to block execution of a request.

Paragraph 12 also allows the requested Party to follow procedures specified in the request, which although not required by the domestic law of the requested Party, are not contrary to that law. This provision is very important because of the wide differences among countries on procedures which must be followed to assure the admissibility of evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if it is fully certified and the defendant has been given a fair opportunity to test its authenticity.[4]

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[4] Title 18, United States Code, Section 3505.

Some countries' laws currently contain no similar provision. Thus, documents assembled in another country in strict conformity with its evidentiary procedures might not be admissible in United States courts. Similarly, United States courts frequently employ procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad. Some of these techniques, while not forbidden, are simply not used in other countries in connection with their investigations.

The negotiators agreed that the primary goal of Article 5, assisting in investigations and prosecutions in the requesting Party, could be frustrated if the requested Party were to insist on producing evidence in a manner which rendered the evidence inadmissible or less persuasive in the requesting Party's courts. For this reason, paragraph 12 requires the requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is contrary to the law of the requested Party, as opposed to simply unfamiliar there, the procedures of the requested Party will be utilized. Paragaraph 12 is consistent with U.S. law on the execution of foreign requests for mutual legal assistance. Section 1782 of Title 28, United States Code, confers a broad grant of authority to district courts to assist foreign tribunals and specifically provides that testimony may be taken and evidence produced according to the practice and procedure of the foreign country requesting the assistance.

Paragraph 10(f) requires the requested Party to state the purpose for which the evidence, information or action is sought in the request. Accordingly, paragraph 13 requires that the information or evidence provided under this article not be used for any purpose other than those stated in the request unless the requested Party gives its consent. Although U.S. authorities sometimes oppose use limits because they do not clearly exist under letters rogatory practice pursuant to 28 U.S.C. section 1782, most of our bilateral MLATs contain some such limitation. The language of Paragraph 13 is similar to that found in the U.S.-Canada MLAT. Because the Convention only covers certain crimes, i.e. those specified in Article 3, it is logical that the use of assistance provided under the Convention be limited to the investigation, prosecution or other proceedings pertaining to those crimes.

Paragraph 14 allows the requesting Party to require that the requested Party keep confidential the request except to the extent disclosure is necessary to execute it. This provision is important in that it protects sensitive investigative information from premature exposure. The paragraph includes, however, a recognition that it may be impossible to keep information confidential. In that case, the requested Party is required to so inform the requesting Party. The decision as to whether or not to proceed with the request then rests appropriately with the requesting Party.

Paragraph 15 specifies classes of requests in which assistance may be refused. Paragraph 15(a) states the obvious, that assistance may be refused if the request does not conform to the provisions of the article. Paragraph 15(b) permits refusal if the assistance would prejudice the sovereignty, security, _ordre public_ or other essential interests of the requested Party. The United States has traditionally interpreted this type of provision sparingly and has viewed the terms "security" and "essential interests" as implicating national security. U.S. negotiators agreed to a somewhat broader listing of grounds for refusal than is usual in our bilateral mutual legal assistance treaties, including prejudice to sovereignty and _ordre public_, because the Convention is a multilateral agreement to which the United States has no say as to who its treaty partners might be. All negotiators agreed, however, that these grounds for refusal did not convert the article's mandatory provisions to discretionary ones. This provision, along with others, contains sufficient safeguards to permit the U.S. to refuse to execute, or to postpone execution of, a request in order to avoid being party to a miscarriage of justice.

Paragraph 15(c) and (d) allow a requested Party to refuse to grant the request if the request would violate its mutual legal assistance laws or if the domestic law of the requested Party would prohibit it from taking the same action in a domestic investigation or proceeding. Thus either ground could be asserted to refuse a request which would violate United States law or privilege. Section 1782 provides that a district court, in response to a foreign request, may not compel a person "to give his testimony or a statement or to produce a document or other thing in violation of a legally applicable privilege."

Paragraph 16 requires the requested Party to give its reasons for any refusal.

Paragraph 17 protects on-going proceedings in the requested Party which may be affected by the request by allowing assistance to be postponed as long as necessary. It imposes an obligation, however, to consult with the requesting Party to see if there is any way assistance can be given subject to whatever terms are necessary.

Paragraph 18 provides "safe conduct" for a person who consents to assist or give evidence pursuant to the Article when he is in the territory of the Requesting Party for acts that predate his departure from the requested Party. A time limit is suggested for this safe conduct of 15 days from the date he is notified officially that he is no longer needed in the territory. The Parties, however, may agree to a different time period. This provision does not protect a person from prosecution for perjury or for any other crime committed by him while he is in the territory of the requested Party.

Paragraph 19 attempts to answer the question of which Party must pay the costs associated with the execution of the request. The paragraph is flexible thereby allowing the Parties involved to reach different agreements. The ordinary costs are to be borne by the requested Party. If substantial or extraordinary costs are involved the Parties must consult concerning who shall bear them.

Paragraph 20 directs Parties to consider entering into bilateral or multilateral agreements or arrangements to enhance, or give effect to this article. This paragraph is intended to encourage Parties to build on the obligations included in the article by both formal and informal agreements.

Article 8 - TRANSFER OF PROCEEDINGS

Final Text:

The Parties shall give consideration to the possibility of transferring to one another proceedings for criminal prosecution of offences established in accordance with article 3, paragraph 1, in cases where such transfer is considered to be in the interests of a proper administration of justice.

Comments:

This article simply requires the Parties to consider the possibility of transferring prosecutions where appropriate. It was included at the request of several European countries which are experimenting either with consolidating charges against a person in one country or transferring proceedings from the country where the crime occurred to the defendant's country of nationality. Except in instances where the United States had concurrent jurisdiction over the offenses charged, we would be unable to accept transfer of a foreign country's criminal proceedings.

Article 9 - OTHER FORMS OF CO-OPERATION AND TRAINING

Final Text:

1. The Parties shall co-operate closely with one another, consistent with their respective domestic legal and administrative systems, with a view to enhancing the effectiveness of law enforcement action to suppress the commission of offences established in accordance with article 3, paragraph 1. They shall, in particular, on the basis of bilateral or multilateral agreements or arrangements:

(a) Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences established in accordance with article 3, paragraph 1, including, if the Parties concerned deem it appropriate, links with other criminal activities;

(b) Co-operate with one another in conducting enquiries, with respect to offences established in accordance with article 3, paragraph 1, having an international character, concerning:

(i) The identity, whereabouts and activities of persons suspected of being involved in offences established in accordance with article 3, paragraph 1;

(ii) The movement of proceeds or property derived from the commission of such offences;

(iii) The movement of narcotic drugs, psychotropic substances, substances in Table I and Table II of this Convention and instrumentalities used or intended for use in the commission of such offences;

(c) In appropriate cases and if not contrary to domestic law, establish joint teams, taking into account the need to protect the security of persons and of operations, to carry out the provisions of this paragraph. Officials of any Party taking part in such teams shall act as authorized by the appropriate authorities of the Party in whose territory the operation is to take place; in all such cases, the Parties involved shall ensure that the sovereignty of the Party on whose territory the operation is to take place is fully respected;

(d) Provide, when appropriate, necessary quantities of substances for analytical or investigative purposes;

(e) Facilitate effective co-ordination between their competent agencies and services and promote the exchange of personnel and other experts, including the posting of liaison officers.

2. Each Party shall, to the extent necessary, initiate, develop or improve specific training programs for its law

enforcement and other personnel, including customs, charged with the suppression of offences established in accordance with article 3, paragraph 1. Such programs shall deal, in particular, with the following:

(a) Methods used in the detection and suppression of offences established in accordance with article 3, paragraph 1;

(b) Routes and techniques used by persons suspected of being involved in offences established in accordance with article 3, paragraph 1, particularly in transit States, and appropriate countermeasures;

(c) Monitoring of the import and export of narcotic drugs, psychotropic substances and substances in Table I and Table II;

(d) Detection and monitoring of the movement of proceeds and property derived from, and narcotic drugs, psychotropic substances and substances in Table I and Table II, and instrumentalities used or intended for use in, the commission of offences established in accordance with article 3, paragraph 1;

(e) Methods used for the transfer, concealment or disguise of such proceeds, property and instrumentalities;

(f) Collection of evidence;

(g) Control techniques in free trade zones and free ports;

(h) Modern law enforcement techniques.

3. The Parties shall assist one another to plan and implement research and training programs designed to share expertise in the areas referred to in paragraph 2 of this article and, to this end, shall also, when appropriate, use regional and international conferences and seminars to promote co-operation and stimulate discussion on problems of mutual concern, including the special problems and needs of transit States.

Comments:

Article 9 provides for mutual assistance, cooperation and training between law enforcement (police-to-police) organizations, and should be distinguished from the more formal mutual legal assistance contained in Article 7. This article establishes a mechanism whereby law enforcement organizations may provide assistance, cooperation and training without the necessity of having to resort to the more formal and cumbersome procedures for mutual legal assistance contained in Article 7.

Paragraph 1 and its subparagraphs contain the provisions related to general law enforcement assistance. In the chapeau parties are obligated to cooperate closely with one another for the purpose of enhancing law enforcement effectiveness. The chapeau provides that this obligation is to be discharged consistent with the domestic legal and administrative systems of the Parties. After some discussion it was agreed that multilateral or bilateral agreements or arrangements would be essential in order to effectively carry out obligations contained in paragraph 1. Moreoever, it was also agreed that multilateral or bilateral agreements or arrangements would be necessary for all the forms of assistance contemplated under the subparagraphs of paragraph 1. The reference to "agreements or arrangements" is intended to capture not only formal agreements (i.e. treaties or executive agreements) but also informal arrangements or practices between the Parties.

Subparagraph (a) requires the establishment of channels of communication and the exchange of information with respect to offenses contained in article 3, paragraph 1 of the Convention. Subparagraph (b) addresses the forms of investigatory assistance to be provided by the Parties. At the plenipotentiary conference the United States stated for the record that the text of paragraph 1(b) provided for the conduct of inquiries that involved offenses specified in Article 3(1) as well as the separate conduct of inquiries with respect to the items marked (i), (ii) and (iii). The U.S. did not want the placement of the word "concerning" by the Drafting Committee to be read as limiting inquiries regarding (i), (ii) and (iii) on the existence of an offense contrary to Article 3(1), which was not the intent of the Drafting Committee.

Subparagraph (c) relates to the establishment of joint law enforcement teams. It was agreed that the establishment of joint law enforcement teams could be a valuable tool in carrying out the provisions of paragraph 1. Nonetheless, it was also understood that the establishment of these teams would need to be done in a manner designed to ensure the sovereignty of the respective Parties. Subparagraph (d) deals with transferring samples of narcotic drugs and psychotropic substances for analytical and investigative purposes. Subparagraph (e) provides for the exchanges of expert personnel and the posting of liaison officers. It should be noted that under this subparagraph there is no requirement that the exchange of personnel or the posting of liaison officers be done on a reciprocal basis.

Paragraph 2 contains the provision related to international cooperation in the area of training. Several types of training programs are delineated in the subparagraphs to paragraph 2, which is simply a representative listing and not all-inclusive. The reference to "law enforcement and other personnel, including customs" was intended to address the fact that in some countries customs officers are not technically viewed as law enforcement personnel. Thus the reference ensures that all government organizations charged with policing offenses established under article 3, paragraph 1 were included within the coverage of this paragraph.

Paragraph 3 is a provision intended to address perceived special needs of transit States, which is more fully explained in the commentary to article 10.

Article 10 - INTERNATIONAL CO-OPERATION AND ASSISTANCE FOR TRANSIT STATES

Final Text:

1. The Parties shall co-operate, directly or through competent international or regional organizations, to assist and support transit States and, in particular, developing countries in need of such assistance and support, to the extent possible, through programs of technical co-operation on interdiction and other related activities.
2. The Parties may undertake, directly or through competent international or regional organizations, to provide financial assistance to such transit States for the purpose of augmenting and strengthening the infrastructure need for effective control and prevention of illicit traffic.
3. The Parties may conclude bilateral or multilateral agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article and may take into consideration financial arrangements in this regard.

Comments:

This article is devoted to encouraging cooperation and assistance to transit states specifically. This emphasis was deemed appropriate by the plenipotentiary conference because of the particularly weighty problems of transit traffic in illicit narcotic drugs and psychotropic substances as they pass through countries enroute to their destination points.

Paragraph 1 calls for parties to cooperate with each other or through regional and international organizations for the purpose of helping so-called transit states (most of which are developing countries). The assistance and support envisoned in this paragraph is in the nature of interdiction and other law enforcement activities. The emphasis on law enforcement assistance is positive for U.S. anti-narcotics objectives because it will encourage greater multi-donor focus on the need for greater coordination and resources devoted to interdiction activities. It also implies that recipient governments will need to devote more effort to interdiction and related law enforcement activities.

Paragraph 2 is slightly nebulous in purpose in that it calls for parties and organizations to provide financial assistance to a broad range of activities/sectors described as "infrastructure."

The phrase "strengthening of infrastructure needed for effective control and prevention of illicit traffic" leaves open not only what specific areas countries and orgnaizations should collaborate on but which countries should receive assistance. In that respect, the broad interpretation of the paragraph is advantageous to U.S. narcotics control objectives because it does not single out for special attention any specific country or countries. In any case, the paragraph is discretionary, not mandatory.

Paragraph 3 encourages countries to conclude bilateral and multilateral agreements in the areas of interdiction and other law enforcement activities. It will stimulate greater cooperation between the United States and several other countries. The collaboration called for will also promote stronger collaboration between European countries and their dependent territories and former colonies.

Article 11 - CONTROLLED DELIVERY

Final Text:

1. If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.

2. Decisions to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.

3. Illicit consignments whose controlled delivery is agreed to may, with the consent of the Parties concerned, be intercepted and allowed to continue with the narcotic drugs or psychotropic substances intact or removed or replaced in whole or in part.

Comments:

The term "controlled delivery" describes a situation in which law enforcement authorities allow, under surveillance, the known passage of an illicit consignment through a territory in which the "controlling" authorities (i.e., police or customs officials) elect not to effect an arrest or seizure immediately in order to trace the onward movement of the consignment. Typically, the seizure of the consignment would occur when the ultimate recipient takes control of the consignment. This procedure allows law enforcement authorities to identify and prosecute higher levels of the illicit organization rather than low-level couriers.

The use of the controlled delivery technique is common in the United States and is used extensively in drug trafficking investigations. In recent years it has found increasing use at the international level. The United Nations Division on Narcotic Drugs circulated a paper on the use of controlled delivery in drug investigations in 1982, and the Customs Cooperation Council conducted a survey in 1983 that indicated that the technique was widely used. Still, a number of countries have indicated domestic legal impediments to cooperating in controlled deliveries without a specific treaty obligation

This article endorses the legitimacy of the controlled delivery technique at the international level and calls for Parties to take the necessary measures to allow for its use.

Due to the sensitivity of a number of countries to this technique, particularly as it pertains to issues of national sovereignty, a number of qualifications were included. Thus, Parties are obliged to take the necessary measures to permit controlled deliveries only "if permitted by the basic principles of their respective domestic legal systems". Also, Parties are only required to take measures "within their possibilities", reflecting a recognition that, in particular circumstances, Parties could be financially burdened by the high cost of using controlled deliveries (i.e., personnel costs associated with constant surveillance) and that such costs could properly be taken into account in establishing policy on requests for cooperation in controlled deliveries.

Even with these qualifications, which were necessary to obtain general agreement on including a controlled delivery article in the Convention, these provisions reflect endorsement of the technique in combatting illicit trafficking across international borders and should foster even greater utilization of the technique on the international level. Nothing in the article will place any obligation on United States law enforcement authorities to participate in a controlled delivery in a specific instance where they choose not to do so. The United States currently has all the necessary measures at its disposal to conduct controlled deliveries but decisions on use of that authority will continue to be on a case-by-case basis.

Paragraph 1 establishes the basic obligation to take the necessary measures to allow for the use of controlled delivery on the international level. This is not an obligation to cooperate in controlled deliveries whenever asked but rather to have the capability to cooperate in a controlled delivery in appropriate cases. Once any existing legislative, policy or procedural restrictions to such cooperation have been removed, a Party will decide on a case-by-case basis whether to participate with another Party in a controlled delivery across national borders.

A Party is obliged to take these measures "if permitted by the basic principles of their respective domestic legal systems". This would eliminate the obligation only for those Parties whose "basic principles" do not allow for such action. Domestic legal impediments of a lesser degree, such as statutes, regulations or law enforcement policy, would not exempt Parties from the obligation unless based on a "basic principle" of their domestic legal system.

Several other concepts are included in paragraph 1. The term "within their possibilities" was included to take into account the fact that some controlled deliveries are costly endeavors and some countries could be constrained by their fiscal and technical resources in participating in them. Therefore, the costs associated with controlled deliveries can be valid factors affecting the measures a Party might take in implementing this article. This issue of costs is further dealt with in paragraph 2 which mitigates, to an extent, this problem of financial burden.

Paragraph 1 also recognizes that controlled deliveries will be conducted on the basis of "agreements or arrangements mutually consented to". Such agreements may be formal or informal; they may or may not be in writing. "Arrangements" denotes the most informal type of interaction, and can include standard practices mutually applied by the competent authorities of each party in such situations, including cooperation among police officials in controlled deliveries without the need for formal written agreements. This approach recognizes that controlled deliveries often arise in fluid and rapidly evolving situations and may require "real time" telephonic arrangements between competent authorities as the consignment travels through multiple jurisdictions.

Paragraph 2 provides that decisions to utilize the technique of controlled delivery will be made on a case-by-case basis. This reflects the fact that such activity can be resource and manpower intensive and also poses the risk that the shipment will be lost. The decision on the costs and risks associated with the controlled delivery must be weighed against the potential benefit in identifying the traffickers involved. Additionally, this paragraph provides that, when necessary, financial arrangements and jurisdictional issues may be considered. The financial arrangements language pertains to the issue of the costs associated with a controlled delivery and the financial burden faced by developing countries in participating in these activities. Parties requesting the participation of another Party in a controlled delivery may, when appropriate, provide for some financial relief. Since a Party allowing an illicit consignment through its territory is permitting an illegal act to occur without taking advantage of its jurisdiction over the act, the Parties, in their arrangements, may include agreements on where to prosecute illegal acts later.

Paragraph 3 provides an option for law enforcement authorities, with consent of the Parties concerned, to remove or replace, in whole or in part, the narcotic drugs and psychotropic substances in an illicit consignment. This issue must be dealt with among the Parties during the controlled delivery since it impacts on the future prosecution of the case. The replacement or removal is a measure to reduce the danger should the shipment, for some unforesseen circumstance, be lost during surveillance. Removing or replacing the drugs reduces the danger associated with losing the shipment but requires careful consideration of the legal issues relating to later prosecution of the offense.

Article 12 - SUBSTANCES FREQUENTLY USED IN THE ILLICIT MANUFACTURE OF NARCOTIC DRUGS OR PSYCHOTROPIC SUBSTANCES

Final Text:

1. The Parties shall take the measures they deem appropriate to prevent diversion of substances in Table I and Table II used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances, and shall co-operate with one another to this end.

2. If a Party or the Board has information which in its opinion may require the inclusion of a substance in Table I or Table II, it shall notify the Secretary-General and furnish him with the information in support of that notification. The procedure described in paragraphs 2 to 7 of this article shall also apply when a Party or the Board has information justifying the deletion of a substance from Table I or Table II, or the transfer of a substance from one Table to the other.

3. The Secretary-General shall transmit such notification, and any information which he considers relevant, to the Parties, to the Commission, and, where notification is made by a Party, to the Board. The Parties shall communicate their comments concerning the notification to the Secretary-General, together with all supplementary information which may assist the Board in establishing an assessment and the Commission in reaching a decision.

4. If the Board, taking into account the extent, importance and diversity of the licit use of the substance, and the possibility and ease of using alternate substances both for licit purposes and for the illicit manufacture of narcotic drugs or psychotropic substances, finds:

(a) That the substance is frequently used in the illicit manufacture of a narcotic drug or psychotropic substance;

(b) That the volume and extent of the illicit manufacture of a narcotic drug or psychotropic substance creates serious public health or social problems, so as to warrant international action,

it shall communicate to the Commission an assessment of the substance, including the likely effect of adding the substance to either Table I or Table II on both licit use and illicit manufacture, together with recommendations of monitoring measures, if any, that would be appropriate in the light of its assessment.

5. The Commission, taking into account the comments submitted by the Parties and the comments and recommendations of the Board, whose assessment shall be determinative as to scientific matters, and also taking into due consideration any other relevant factors, may decide by a two-thirds majority of its members to place a substance in Table I or Table II.

6. Any decision of the Commission taken pursuant to this article shall be communicated by the Secretary-General to all States and other entities which are, or which are entitled to become, Parties to this Convention, and to the Board. Such decision shall become fully effective with respect to each Party one hundred and eighty days after the date of such communication.

7. (a) The decisions of the Commission taken under this article shall be subject to review by the Council upon the request of any Party filed within one hundred and eighty days after the date of notification of the decision. The request for review shall be sent to the Secretary-General, together with all relevant information upon which the request for review is based.

(b) The Secretary-General shall transmit copies of the request for review and the relevant information to the Commission, to the Board and to all Parties, inviting them to submit their comments within ninety days. All comments received shall be submitted to the Council for consideration.

(c) The Council may confirm or reverse the decision of the Commission. Notification of the Council's decision shall be transmitted to all States and other entities which are, or which are entitled to become, Parties to this Convention, to the Commission and the Board.

8. (a) Without prejudice to the generality of the provisions contained in paragraph 1 of this article and the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, the Parties shall take the measures they deem appropriate to monitor the manufacture and distribution of substances in Table 1 and Table II which are carried out within their territory.

(b) To this end, the Parties may:

(i) Control all persons and enterprises engaged in the manufacture and distribution of such substances;

(ii) Control under license the establishment and premises in which such manufacture or distribution may take place;

(iii) Require that licensees obtain a permit for conducting the aforesaid operations;

(iv) Prevent the accumulation of such substances in the possession of manufacturers and distributors, in excess of the quantities required for the normal conduct of business and the prevailing market conditions.

9. Each Party shall, with respect to substances in Table I and Table II, take the following measures:

(a) Establish and maintain a system to monitor international trade in substances in Table I and Table II in order to facilitate the identification of suspicious transactions. Such monitoring systems shall be applied in close co-operation with manufacturers, importers, exporters, wholesalers and retailers, who shall inform the competent authorities of suspicious orders and transactions.

(b) Provide for the seizure of any substance in Table I or Table II if there is sufficient evidence that it is for use in the illicit manufacture of a narcotics drug or psychotropic substance.

(c) Notify, as soon as possible, the competent authorities and services of the Parties concerned if there is reason to believe that the import, export or transit of a substance in Table I or Table II is destined for the illicit manufacture of narcotic drugs or psychotropic substances, including in particular information about the means of payment and any other essential elements which led to that belief.

(d) Require that imports and exports be properly labelled and documented. Commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents shall include the names, as stated in Table I or Table II, of the substances being imported or exported, the quantity being imported or exported, and the name and address of the exporter, the importer and, when available, the consignee.

(e) Ensure that documents referred to in subparagraph (d) of this paragraph are maintained for a period of not less than two years and may be made available for inspection by the competent authorities.

10. (a) In addition to the provisions of paragraph 9, and upon request to the Secretary-General by the interested Party, each Party from whose territory a substance in Table I is to be exported shall ensure that, prior to such export, the following information is supplied by its competent authorities to the competent authorities of the importing country:

(i) Name and address of the exporter and importer and, when available, the consignee;

(ii) Name of the substance in Table I;

(iii) Quantity of the substance to be exported;

(iv) Expected point of entry and expected date of dispatch;

(v) Any other information which is mutually agreed upon by the Parties.

(b) A Party may adopt more strict or severe measures of control than those provided by this paragraph if, in its opinion, such measures are desirable or necessary.

11. Where a Party furnishes information to another Party in accordance with paragraphs 9 and 10 of this article, the Party furnishing such information may require that the Party receiving it keep confidential any trade, business, commercial or professional secret or trade process.

12. Each Party shall furnish annually to the Board, in the form and manner provided for by it and on forms made available by it, information on:

(a) The amounts seized of substances in Table I and Table II and, when known, their origin;

(b) Any substance not included in Table I or Table II which is identified as having been used in illicit manufacture of narcotic drugs or psychotropic substances, and which is deemed by the Party to be sufficiently significant to be brought to the attention of the Board;

(c) Methods of diversion and illicit manufacture.

13. The Board shall report annually to the Commission on the implementation of this article and the Commission shall periodically review the adequacy and propriety of Table I and Table II.

14. The provisions of this article shall not apply to pharmaceutical preparations, nor to other preparations containing substances in Table I or Table II that are compounded in such a way that such substances cannot be easily used or recovered by readily applicable means.

Comments:

This article is based on the growing concern over the diversion of legally produced chemicals which are either used in the basic manufacture of illicit controlled substances or are used to facilitate the processing of illicit controlled substances. The United States has been a leader in the international effort to curtail the diversion of legally produced chemicals into the illicit market, where they are used by drug traffickers in the illicit production of drugs. The recently-enacted Anti-Drug Abuse Act of 1988 (Pub. L. 100-690) included the "Chemical Diversion and Trafficking Act of 1988" (102 STAT. 4312) which established a system to monitor the distribution of precursor and essential chemicals within the United States as well as shipments into and out of the United States. The provisions of Article 12, although narrower in scope than those provided under U.S. law, provide for an international standard for monitoring and control of imports and exports of specifically identified chemicals on an international level.

This article can be broken down into four basic groups of provisions.

(1) Procedural Provisions: The processes by which chemicals to be covered by the article are selected and how the international bodies administer the article are found in paragraphs 2 through 7 and 11 through 14. The procedures for adding or deleting chemicals from the Tables parallel those currently in place for adding or deleting narcotic drugs and psychotropic substances in the previous two conventions (see Article 3 of the Single Convention and Article 2 of the

Psychotropic Substances Convention). Minor modifications are made to the existing procedures in keeping with the differing nature of the chemicals in questions vis-a-vis narcotic drugs and psychotropic substances. The differences include utilizing, for technical evaluations, the International Narcotic Trade Board (INCB), which is the international body whose competency lies in international trade in drugs and chemicals in lieu of the World Health Organization, whose competency lies in pharmacological issues.

Additional procedural provisions are included in paragraphs 11 through 14. Paragraph 11 provides for confidentiality of trade secrets. Paragraph 12 provides for reporting useful information to the INCB on seizures, new chemicals, and methods of diversion. Paragraph 13 calls for the INCB to report to the Commission on Narcotic Drugs annually on the implementation of the article. Paragraph 14 is intended to assure that commercial products that contain listed chemicals are not included in the control procedures unnecessarily.

(2) Diversion Prevention: General provisions for prevention of diversion of these chemicals on a national level, and for cooperation among Parties on the international level, including a list of possible control measures, are found in paragraphs 1 and 8. Paragraph 1 obligates Parties to take measures deemed necessary to curtail diversion of listed substances and to cooperate with other Parties to this end. These measures pertain to domestic activity as opposed to the international requirements of paragraphs 9 and 10. This is more broadly detailed in paragraph 8 which reiterates the requirements of paragraph 1, and the existing conventions, as well as laying out a list of possible actions that may be considered by a party.

(3) International Monitoring: The article imposes specific obligations on parties to provide for monitoring of international trade in all listed chemicals, such as providing for cooperation with regard to suspicious shipments, providing for proper labeling and documentation of shipments, and maintenance of records. There is also a requirement for advance notification to the country of import for the group of chemicals designated in Table I. With respect to substances listed in both Table I and Table II, Paragraph 9 obligates all parties to establish a system of monitoring international trade in these chemicals to facilitate the identification of suspicious transactions. Additional obligations involve the seizure of illicit shipments, notification of authorities of a country receiving a shipment if there is reason to suspect that it is destined for the illicit traffic, establishment of proper labeling and documentation requirements,

maintenance of required records, as well as their availability to national authorities.

Paragraph 10 includes more stringent provisions for those chemicals in Table I which, by their nature, can be monitored more closely. The major additional requirement is for advanced notification to the country of destination that a shipment of a Table I chemical is being sent, including information on the name and address of the exporter and importer, the name of the substance and quantity, an the port of destination and shipment date.

(4) Lists of Chemicals: The chemicals covered by the Article are listed in the Annex to the Convention. Table I includes six chemicals that have relatively narrow uses and are traded in limited volume on the international market: ephedrine, ergometrine, ergotamine, lysergic acid, 1-phenyl-2-propanone, and psuedoephedrine. Three of these chemicals are precursors to LSD and three are precursors to amphetamine and methamphetamine. Table II also has six chemicals but these are chemicals that have a wide range of uses and are traded in large quantities: acetic anhydride, acetone, anthranilic acid, ethyl ether, phenylacetic acid, and piperidine. These include chemicals used in the processing of heroin and cocaine and chemicals that are precursors to methaqualone, amphetamine and PCP.

The two lists were created because the differences in the uses of the chemicals in question, the volume of trade, and the ability to set up effective monitoring systems. Table I chemicals have specific uses and are traded in the international market on a much smaller scale than Table II chemicals. Table II chemicals also have much broader uses. This allows for a dual system of controls with general controls on all listed chemicals and a more stringent set of controls over a limited group of them.

The provisions of Article 12 are consistent with U.S. policy with regard to monitoring the trade in chemicals used in the illicit production of narcotic drugs and psychotropic substances. The recent enactment of the Chemical Diversion and Trafficking Act of 1988 puts the U.S. in a position of meeting or exceeding all the requirements of this Article.

Specifically, the procedural provisions of the Article are consistent with existing procedures used for the scheduling of narcotic drugs and psychotropic substances in the previous two conventions and have been deemed satisfactory in the past. Modifications which were made to fit the specific requirements of evaluating these chemicals seem well justified.

The general monitoring provision at the national level are also consistent with U.S. policy. The U.S., pursuant to the provisions of the Chemical Diversion and Trafficking Act of 1988, would be in full compliance.

The specific international monitoring provisions are also consistent with U.S. policy in this area. With the implementation of the provisions of Section 6503 of the Chemical Diversion and Trafficking Act of 1988, which call for advance notification (15 days) to the Attorney General of Exports of listed substances, the U.S. will be in a position to fully comply with the provisions of both paragraphs 9 and 10.

The lists of chemicals covered by Article 12 and annexed to the Convention are more limited than the list included under U.S. law. All the substances under the Convention are covered under the U.S. chemical statute (21 U.S.C. Sec. 802) or, as in the case of Lysergic acid and phenyl-2 propanone, under control in the schedules of controlled substances.

Based on the enactment of the Chemical Diversion and Trafficking Act of 1989, Article 12 would require no additional legislation at this time. However, it would be preferable to have legislation facilitating compliance under U.S. law when substances are added to Table I that are not covered in U.S. statutes. This would be a statute similar to 21 U.S.C. 811(d), which establishes a procedure for taking action to bring the U.S. into compliance with the existing drug conventions when substances are added to these conventions.

Article 13 - MATERIALS AND EQUIPMENT

Final Text:

> The Parties shall take such measures as they deem appropriate to prevent trade in and the diversion of materials and equipment for illicit production or manufacture of narcotic drugs and psychotropic substances and shall co-operate to this end.

Comments:

Article 13 pertains to the prevention of the utilization of common materials and equipment in the illicit manufacture of narcotic drugs and psychotropic substances. Experience has shown that a varity of equipment including glassware, mixing tanks, tableting machines, encapsulating machines, dryers, and other specialized and non-specialized equipment are an intrinsic part of the illicit manufacturing process. In many cases the equipment used is specifically designed for legitimate drug manufacture but diverted into illicit activities. In addition to equipment, a variety of materials such as binding agents, gelatin capsules, and ordinary chemicals are also used in the illicit manufacture of drugs of abuse.

For more than a decade, the United States has participated in voluntary programs with various industries to identify unusual purchases of these types of equipment and materials. Since the inception of the Controlled Substance Act, the manufacture, distribution, or possession of punches, dies, and other manufacturing equipment utilized to counterfeit controlled substances has been prohibited under 21 U.S.C. 843(a)(5). The Chemical Diversion and Trafficking Act of 1988 places additional controls, under 21 U.S.C. 830, over transactions involving the distribution of tableting and encapsulating machines. It also provides for additional penalites, under 21 U.S.C. 843(a)(6) and (7), for the possession, manufacture, distribution or import, for illicit purposes, of such items as three-necked flasks, tableting machines, encapsulating machines, and other equipment.

Article 13 has two basic requirements. First, it obligates Parties to take measures as they deem appropriate to prevent the illicit trade in and diversion of materials and equipment used in illicit production of narcotic drugs and psychotropic substances. Second, it mandates that Parties cooperate in these efforts.

There is no need for any legislation to meet these requirements. The United States has been a leader in this field for over two decades. Even before the passage of the Chemical Diversion and Trafficking Act, U.S. law exceeded by a great margin the requirements of this Article. By contrast, many other nations lack such provisions and the benefit of the Article lies in the fact that, by adhering to the Convention, those countries will be encouraged to adopt effective provisions in this area.

Article 14 - MEASURES TO ERADICATE ILLICIT CULTIVATION OF NARCOTIC PLANTS AND TO ELIMINATE ILLICIT DEMAND FOR NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

Final Text:

1. Any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances and to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.

2. Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.

3. (a) The Parties may co-operate to increase the effectiveness of eradication efforts. Such co-operation may, *inter alia*, include support, when appropriate, for integrated rural development leading to economically viable alternatives to illicit cultivation. Factors such as access to markets, the availability of resources and prevailing socio-economic conditions should be taken into account before such rural development programs are implemented. The Parties may agree on any other appropriate measures of co-operation.

(b) The Parties shall also facilitate the exchange of scientific and technical information and the conduct of research concerning eradication.

(c) Whenever they have common frontiers, the Parties shall seek to co-operate in eradication programs in their respective areas along those frontiers.

4. The Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic. These measures may be based, *inter alia*, on the recommendations of the United Nations, specialized agencies of the United Nations such as the World Health Organization, and other competent international organizations, and on the Comprehensive Multidisciplinary Outline adopted by the International Conference on Drug Abuse and Illicit Trafficking, held in 1987, as it pertains to governmental and non-governmental agencies and private efforts in the fields of

prevention, treatment and rehabilitation. The Parties may enter into bilateral or multilateral agreements or arrangements aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances.

5. The Parties may also take necessary measures for early destruction or lawful disposal of the narcotic drugs, psychotropic substances and substances in Table I and Table II which have been seized or confiscated and for the admissibility as evidence of duly certified necessary quantities of such substances.

Comment:

Paragraph 1 states precisely that parties to this Convention cannot take measures to eradicate illicit cultivation of plants containing narcotic and psychotropic substances that are less stringent than measures stipulated in the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, and the 1971 Convention on Psychotropic Substances. The language in this paragraph thus protects the applicable articles in the 1961 and 1971 Conventions regarding illicit cultivation of coca bush, marijuana and opium poppy and leaves no question as to what cultivation is illegal in nature versus that which is legal for medicinal, traditional and scientific purposes.

The sense of this paragraph - the protection of the relevant articles of the 1961 and 1971 Conventions - was a key negotiating point for the U.S. delegation. Throughout the negotiations, it was evident that certain countries, particularly those party to the Single Convention and its Protocol but in contravention of Article 49(e) due to their failure to eliminate illicit coca bush cultivation, would try to reinterpret the Single Convention by redefining illicit cultivation to account for new cultivation in non-traditional areas. Some countries also sought to define a regime for coca cultivation separate from marijuana and opium poppy cultivation. The final wording of this paragraph was adopted after arduous negotiations that culminated in the objecting countries having to withdraw their amendments after being informed that their proposals would be defeated were a vote to be called.

The phrase "elimination of illicit demand" was included as compromise language introduced by several producing countries that felt too little emphasis was being given to the problems of demand reduction. The intent of this phrase corresponds to U.S. efforts to reduce demand domestically and to assist other developing countries in their efforts to curb demand.

Paragraph 2 calls for parties to take the necessary measures to prevent illicit cultivation of plants containing narcotic and psychotropic substances. Its inclusion in this article makes explicit the important role illicit cultivation plays in drug trafficking. The second sentence gives due recognition to the problems of traditional licit use and protection of the environment deemed important by many of the negotiating countries. The measures called for in paragraph 2 correspond to the policies and practices of the U.S.

Paragraph 3(a) provides a focus on some of the means by which parties should cooperate to eradicate plants containing narcotic and psychotropic substances. The means specified are not all-inclusive but highlight existing areas of cooperation between countries and take into account the multi-faceted nature of the problem of illicit cultivation. The last sentence of paragraph 3(a) allows for the employment of other measures of cooperation. The generality of the sentence provides for flexibility between cooperating countries regarding other types of measures to be used, such as specific methods of crop eradication.

Paragraph 3(b) calls for the facilitation of research and information exchange of scientific and technical information concerning eradication. This sub-paragraph will enable countries which are interested in seeking scientific and technical solutions to crop eradication to collaborate more closely. This is a key objective of the U.S. international narcotics control strategy. This provision may also stimulate other countries not yet inclined to engage in crop eradication by scientific and technical means to do so. More importantly, the provision can be used by the U.S. to seek collaboration from those producing countries that have been unwilling to consider scientific and technical measures of eradication.

Paragraph 3(c) is a useful provision designed to stimulate stronger collaborative efforts between bordering countries where plants containing narcotic and psychotropic substances are being cultivated illicitly.

Paragraph 4 was introduced at the plenipotentiary conference by several countries that believe a balance between supply and demand should be maintained in this article. Having achieved the goal of including strong language regarding crop eradication and elimination of illicit cultivation, the U.S. delegation agreed to the inclusion of this paragraph on the grounds that demand reduction is a necessary component of any domestic or international drug control effort.

The references to predicating demand reduction efforts on recommendations of UN bodies, such as the World Health Organization, and the Comprehensive Multidisciplinary Outline of Future Activities in Drug Control (CMO) approved at the International Conference on Drug Abuse and Illicit Trafficking are useful in that they should encourage parties to adopt measures already agreed to by UN member countries. Furthermore, inclusion of efforts approved by other UN bodies and conferences gives impetus to the activities of these bodies and conferences and should promote collaboration between parties in the many areas of cooperation recommended in the CMO.

Paragraph 5, also a late-comer provision, was readily agreed to by all countries because it addresses the very serious problem of storage of illicit drugs seized or confiscated by law enforcement authorities. This provision allows for parties to destroy or dispose of, at the earliest possible time, seized narcotic drugs, psychotropic substances and substances in Tables I and II of this Convention. It also provides for the admissibility as evidence of samples of such substances in court, which is an important component in legal and judicial proceedings leading to the arrest and conviction of drug traffickers.

Article 15 - COMMERCIAL CARRIERS

Final Text:

1. The Parties shall take appropriate measures to ensure that means of transport operated by commercial carriers are not used in the commission of offences established in accordance with article 3, paragraph 1; such measures may include special arrangements with commercial carriers.

2. Each Party shall require commercial carriers to take reasonable precautions to prevent the use of their means of transport for the commission of offences established in accordance with article 3, paragraph 1. Such precautions may include:

(a) If the principal place of business of a commercial carrier is within the territory of the Party:

(i) Training of personnel to identify suspicious consignments or persons;

(ii) Promotion of integrity of personnel;

(b) If a commercial carrier is operating within the territory of the Party:

(i) Submission of cargo manifests in advance, whenever possible;

(ii) Use of tamper-resistant, individually verifiable seals on containers;

(iii) Reporting to the appropriate authorities at the earliest opportunity all suspicious circumstances that may be related to the commission of offences established in accordance with article 3, paragraph 1.

3. Each Party shall seek to ensure that commercial carriers and the appropriate authorities at points of entry and exit and other customs control areas co-operate, with a view to preventing unauthorized access to means of transport and cargo and to implementing appropriate security measures.

Comments:

Article 15 addresses illicit trafficking via commercial carriers. The wording of the draft proposed by the Review Group resulted from extensive discussion and hard-fought compromises. Because it reflected a balance between conflicting positions, the Plenipotentiary Conference adopted it without significant alteration. In concept, the article parallels the carrier agreements that U.S. Customs has negotiated with commercial carriers.

Paragraph 1 requires Parties to take appropriate measures to ensure that means of transport operated by commercial carriers are not used in the commission of offenses established under article 3, paragraph 1 of the Convention. These measures may include special arrangements with commercial carriers.

Paragraph 2 mandates that Parties shall require commercial carriers to take reasonable precautions to prevent the use of their means of transport for the commission of offenses established under article 3, paragraph 1. This is the first time an international treaty has recognized that commercial carriers have an obligation to prevent their means of transport from being used for illicit drug purposes. The paragraph identifies some of the precautions commercial carriers may take, but the list is not all-inclusive. The listed precautions are shown in two parts: Part "a" deals with those where the principal place of business of a commercial carrier is within the territory of the Party; part "b" deals with those where a commercial carrier is operating within the territory of the Party.

The criterion of "reasonable precautions" reflected a negotiating compromise reached after extensive discussions between those countries that wanted to make the criterion stronger and those that wanted it weaker. U.S. law provides for the stronger criterion of the "highest degree of care and diligence." Because Article 23 of the Convention states that a Party may adopt stricter or more severe measures than those provided by the Convention, the United States can accept the use of "reasonable precautions" in Article 15. Thus reasonable precautions would not adversely affect U.S. law. Similarly, the division of the listed precautions into two parts was a compromise resulting from discussions between countries who felt that the type of precautions varied depending upon whether a commercial carrier had its principal place of business, or was operating, within the territory of a Party. The report of the expert group that drafted this Article states that a Party who wanted to apply both part a and part b could do so; they are not mutually exclusive. The United States asked that the report of the Plenipotentiary Conference reflect this conclusion of the expert group.

Paragraph 3 seeks to ensure that commercial carriers and the appropriate authorities at points of entry and exit and other customs control areas cooperate in order to prevent unauthorized access to means of transport and cargo and to implement appropriate security measures.

Article 16 - COMMERCIAL DOCUMENTS AND LABELLING OF EXPORTS

Final Text:

1. Each Party shall require that lawful exports of narcotic drugs and psychotropic substances be properly documented. In addition to the requirements for documentation under article 31 of the 1961 Convention, article 31 of the 1961 Convention as amended and article 12 of the 1971 Convention, commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents shall include the names of the narcotic drugs and psychotropic substances being exported as set out in the respective Schedules of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, the quantity being exported, and the name and address of the exporter, the importer, and, when available, the consignee.

2. Each Party shall require that consignments of narcotic drugs and psychotropic substances being exported be not mislabelled.

Comments:

The issue of commercial documentation and labelling was addressed in an independent article because it could not be readily accommodated within the framework of article 12, which deals with substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances. Article 16 is intended to ensure the correct labelling of consignments of narcotic drugs and psychotropic substances, the accurate use of the listed International Non-Proprietary Names, and the proper utilization of accompanying papers, customs documentation, manifests and other shipping documents.

The text agreed by the expert group, based on an proposal by the Federal Republic of Germany, was adopted in article 16 with relatively minor changes. The one significant revision was inclusion of a reference to the two existing drug conventions, to assure that article 16 will not be interpreted as altering the requirements of those conventions but rather as imposing an additional and independent obligation on the parties.

Article 17 - ILLICIT TRAFFIC BY SEA

Final Text:

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.

2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, *inter alia*:

   (a) Board the vessel;
   (b) Search the vessel;
   (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, person and cargo on board.

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

8. A Party which has taken action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

Comments:

Article 17 describes an extensive and well-functioning practice in drug interdiction efforts at sea, based on the traditional rule of flag State duty to exercise its jurisdiction and control over ships flying its flag. The negotiators never contemplated a regime for nonconsensual enforcement against foreign flag vessels at sea beyond the contiguous zone.

Paragraph 1 advances the customary international law obligation, reflected in Article 108(1) of the 1982 United Nations Law of the Sea Convention ("LOS Convention"), by requiring cooperation "to the fullest extent possible" in conformity with the international law of the sea.

The "international law of the sea," to which reference is made throughout Article 17, is the customary law reflected in the navigational articles of the 1982 LOS Convention. At the Conference, the U.S. delegation so stated its understanding in a statement for the record.

Paragraph 2 of Article 17 develops, for States Party, the law found in Article 108(2) of the 1982 LOS Convention, by expanding the situations in which cooperation may be requested to include interdiction of stateless vessels, thereby recognizing a practice which has developed unchallenged over the years. Paragraph 2 also develops the law by obligating States requested to render assistance with the means available to them.

Paragraphs 3 to 10 represent straightforward codifications of present-day drug interdiction efforts at sea. Paragraphs 3 and 4 recognize the existing U.S. "special arrangement" practice, under which the United States may, with the consent of the flag state, board foreign flag vessels on the high seas which are suspected of violating United States law. See United States v. Rubies, 612 F.2d 397 (9th Cir. 1979), cert. denied 446 U.S. 940 (1980); United States v. Romero-Galue, 757 F.2d 1147 (11th Cir. 1985).

During the negotiation of Article 17, substantial time was spent in discussions concerning the maritime area in which the Convention would apply. Some States expressed a desire to limit the application of the Convention to the high seas as that term is defined in the 1982 LOS Convention. This was unacceptable to the U.S. delegation, since the definition of "high seas" in the 1982 LOS Convention excludes vast areas beyond the outer limit of the territorial sea, including contiguous zones and exclusive economic zones (see Art. 86 of the LOS Convention). Thus, the effect of limiting the application of the current Convention to the high seas could have been an interpretation that coastal state permission was required when boardings were conducted in those areas. Such an interpretation would have created a new coastal state right not contemplated in the LOS Convention.1/ The phrase "a vessel exercising freedom of navigation in accordance with international law" is intended to resolve this issue. The phrase means a vessel which is in an area, including the coastal state's contiguous zone, seaward of the territorial sea of a coastal state.

Paragraph 5 requires Parties taking action under Article 17 to take "due account" of safety of life at sea, security of the vessel and the cargo, and the commercial and legal interests of the flag State or any other interested State.

Paragraph 6 permits a flag state authorizing actions taken under Article 17 to subject its authorization to mutually agreed-upon conditions. At the conference, the U.S. delegation stated for the record that it should be understood in light of actual experience and practice, and the duty to cooperate to the fullest extent possible in drug interdiction. Fulfillment of that duty in good faith and consistently with the object and purpose of this Convention precludes the imposition of unreasonable, unnecessary or extraneous conditions.

Paragraph 7 requires expeditious response to requests for

1/ The rights of a coastal state in its contiguous zone and exclusive economic zone are limited and do not include the right to approve or object to narcotics law enforcement activities by third parties against vessels flying the flag of a state other than the coastal state. See LOS Convention, Part II, Section 4 and Part IV.

registry verification and for authorization pursuant to paragraph 3, and designation of an authority or authorities to receive and respond to requests.

Paragraph 8 requires a Party which has taken any action in accordance with this Article to promptly inform the flag State.

Paragraph 9 requires Parties to consider entering into bilateral or regional agreements or arrangements.[1]

Paragraph 10 provides that action pursuant to paragraph 4 may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. This language is identical to, and is intended to have the same meaning as, that in Articles 107 (seizure on account of piracy) and 111(5) (right of hot pursuit) of the 1982 LOS Convention.

Paragraph 11 requires Parties taking action in accordance with this Article to take due account of the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

At the plenipotentiary conference, the U.S. delegation stated for the record its understanding that, consistent with the international law of the sea, with regard to illicit trafficking by sea, Article 17, paragraph 11 refers to the limited set of situations in which a coastal state has rights beyond the outer limit of the territorial sea, i.e., those involving hot pursuit in the exclusive economic zone and on the high seas and competent exercises of contiguous zone jurisdiction. The paragraph does not imply endorsement of any broader coastal state claims regarding illicit traffic interdiction in the exclusive economic zone. The United States delegation views this paragraph as a straightforward non-derogation clause intended to preserve, and not to affect in any way, existing rights and obligations under international law. As noted above, coastal State consent is not necessary under the international law of the sea for foreign flag law enforcement against vessels not flying the flag of that coastal State beyond the coastal state's territorial sea. The attempt to secure a broader coastal state right or claim to sovereignty in the exclusive economic zone failed during negotiations on the 1982 Law of the Sea Convention, and that result has not been altered here.

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[1] The United States has entered into several bilateral agreements, e.g., with the United Kingdom, 13 November 1981, TIAS 10296, 33 UST 4224, and The Bahamas, 17 Febraury 1989, TIAS _____, and is actively engaged in negotiation with other Latin and South American countries.

Article 18 - FREE TRADE ZONES AND FREE PORTS

Final Text:

1. The parties shall apply measures to suppress illicit traffic in narcotic drugs, psychotropic substances and substances in Table I and Table II in free trade zones and in free ports that are no less stringent than those applied in other parts of their territories.

2. The Parties shall endeavour:

(a) To monitor the movement of goods and persons in free trade zones and free ports, and, to that end, shall empower the competent authorities to search cargoes and incoming and outgoing vessels, including pleasure craft and fishing vessels, as well as aircraft and vehicles and, when appropriate, to search crew members, passengers and their baggage;

(b) To establish and maintain a system to detect consignments suspected of containing narcotic drugs, psychotropic substances and substances in Table I and Table II passing into or out of free trade zones and free ports;

(c) To establish and maintain surveillance systems in harbour and dock areas and at airports and border control points in free trade zones and free ports.

Comments:

Paragraph 1 contains the general obligation that Parties apply measures to suppress illicit trafficking in free trade zones and free ports that are no less stringent than those applied in other parts of their territory. Paragraph 2 delineates measures that the Parties shall endeavor to implement in order to carry out the general obligation, such as: monitoring the movement of goods and persons in free trade zones and free ports; establishing and maintaining systems for detecting suspect cargo passing into or out of these areas; and establishing and maintaining surveillance systems within these areas.

Most delegations, like the United States, supported this article without any substantive change. However, one delegation attempted to replace the term "illicit traffic" in the text with the narrower concept of "illicit transport or transaction". It argued that free trade zones and free ports are generally not outside the penal jurisdiction of a Party, and as such the narrower term addressed more specifically the type of activity contemplated by the concept of free trade zones. Another delegation argued that any search of crew members and passengers under this article should be conducted with respect for their human rights and dignity. Its position was that, in order to avoid abuses of search authority, some form of protection should be provided in this article. Both proposals received little support and were not included in the final text.

With a few modifications, the text of the original draft article was adopted by the Conference.

This article is consistent with U.S. law.

Article 19 - THE USE OF THE MAILS

Final Text:

1. In conformity with their obligations under the Conventions of the Universal Postal Union, and in accordance with the basic principles of their domestic legal systems, the Parties shall adopt measures to suppress the use of the mails for illicit traffic and shall co-operate with one another to that end.

2. The measures referred to in paragraph 1 of this article shall include, in particular:

(a) Co-ordinated action for the prevention and repression of the use of the mails for illicit traffic;

(b) Introduction and maintenance by authorized law enforcement personnel of investigative and control techniques designed to detect illicit consignments of narcotic drugs, psychotropic substances and substances in Table I and Table II in the mails;

(c) Legislative measures to enable the use of appropriate means to secure evidence required for judicial proceedings.

Comments:

Paragraph 1 contains a general obligation that the Parties shall adopt measures to suppress the use of the mails for illicit traffic and cooperate with one another for that purpose. The reference to the Conventions of the Universal Postal Union is simply to ensure that the obligation contained in this article will be carried out in a manner consistent with those Conventions. Paragraph 2 delineates the measures that the Parties shall implement in order to carry out the general obligation of paragraph 1. The measures listed in paragraph 2 are not, however, all-inclusive.

Attempts to require that measures under this article be "in strict compliance" (rather than "consistent") with domestic law and to replace the term "illicit traffic" with "illicit dispatch of narcotic drugs" were rejected. After only minor modifications the text as it appeared in the draft article was adopted by the Conference. The text is consistent with U.S. law.

Article 20 - INFORMATION TO BE FURNISHED BY THE PARTIES

Final Text:

1. The Parties shall furnish, through the Secretary-General, information to the Commission on the working of this Convention in their territories and, in particular:

(a) The text of laws and regulations promulgated in order to give effect to the Convention;

(b) Particulars of cases of illicit traffic within their jurisdiction which they consider important because of new trends disclosed, the quantities involved, the sources from which the substances are obtained, or the methods employed by persons so engaged.

2. The Parties shall furnish such information in such a manner and by such dates as the Commission may request.

Comments:

Article 20, like the three articles which follow it, is modeled after the corresponding provisions in the 1961 Single Convention and the 1971 Psychotropic Substances Convention. The information and reporting requirements set out in those earlier Conventions have been accepted and followed by States Party and have facilitated the work of the International Narcotics Control Board in carrying out its responsibilities of ensuring compliance with the treaties. In some matters, the reporting and information provisions have been applied to drugs not yet scheduled under a voluntary reporting mechanism agreed to by the Commission. The fact that such voluntary measures have been implemented by the majority of States Party attests to the well-functioning nature of the relevant provisions of those treaties. It was from that point of view, as well as the highly expert nature of the Board, that the drafters of this Convention decided to pattern articles 20-23 after those relevant provisions in the two existing treaties.

Article 20 corresponds closely to Article 18 of the Single Convention, as amended. Its purpose is to establish what information parties should provide to the Secretary General to enable him to assure the aims of the Convention are being met. The drafters limited the type and amount of information requested to that deemed most important so as not to inundate the UN with more information than it could handle. Emphasis is placed clearly on information relating specifically to matters pertaining to laws and activities associated with drug trafficking.

Article 21 - FUNCTIONS OF THE COMMISSION

Final Text:

The Commission is authorized to consider all matters pertaining to the aims of this Convention and, in particular:

(a) The Commission shall, on the basis of the information submitted by the Parties in accordance with Article 20, review the operation of this Convention;

(b) The Commission may make suggestions and general recommendations based on the examination of the information received from the Parties;

(c) The Commission may call the attention of the Board to any matters which may be relevant to the functions of the Board;

(d) The Commission shall, on any matter referred to it by the Board under article 22, paragraph 1(b), take such action as it deems appropriate;

(e) The Commission may, in conformity with the procedures laid down in article 12, amend Table I and Table II;

(f) The Commission may draw the attention of non-Parties to decisions and recommendations which it adopts under this Convention, with a view to their considering taking action in accordance therewith.

Comments:

Article 21 corresponds to Article 8 of the Single Convention and Article 17 of the Psychotropic Substances Convention. It essentially gives the Commission on Narcotic Drugs the same oversight functions as those assigned to it under the other two Conventions. The drafters deemed important the role the Commission should play in working with Commission member countries and states party to ensure the aims of the Convention are carried out. This Article does not broaden the role the Commission will play in the implementation of this Convention from the role it assumes in overseeing the other two treaties.

Article 22 - FUNCTIONS OF THE BOARD

Final Text:

1. Without prejudice to the functions of the Commission under article 21, and without prejudice to the functions of the Board and the Commission under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention:

(a) If, on the basis of its examination of information available to it, to the Secretary-General or to the Commission, or of information communicated by United Nations organs, the Board has reason to believe that the aims of this Convention in matters related to its competence are not being met, the Board may invite a Party or Parties to furnish any relevant information;

(b) With respect to article 12, 13 and 16:

(i) After taking action under subparagraph (a) of this article, the Board, if satisfied that it is necessary to do so, may call upon the Party concerned to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of article 12, 13 and 16;

(ii) Prior to taking action under (iii) below, the Board shall treat as confidential its communications with the Party concerned under the preceding subparagraphs;

(iii) If the Board finds that the Party concerned has not taken remedial measures which it has been called upon to take under this subparagraph, it may call the attention of the Parties, the Council and the Commission to the matter. Any report published by the Board under this subparagraph shall also contain the views of the Party concerned if the latter so requests.

2. Any Party shall be invited to be represented at a meeting of the Board at which a question of direct interest to it is to be considered under this article.

3. If in any case a decision of the Board which is adopted under this article is not unanimous, the views of the minority shall be stated.

4. Decisions of the Board under this article shall be taken by a two-thirds majority of the whole number of the Board.

5. In carrying out its functions pursuant to subparagraph 1(a) of this article, the Board shall ensure the confidentiality of all information which may come into its possession.

6. The Board's responsibility under this article shall not apply to the implementation of treaties or agreements entered into between Parties in accordance with the provisions of this Convention.

7. The provisions of this article shall not be applicable to disputes between Parties falling under the provisions of article 32.

Comments:

Article 22 is similar in purpose and intent to Articles 9 and 14 of the Single Convention and Article 19 of the Psychotropic Substances Convention. It reflects an intent to to give the Board a broad mandate to oversee the implementation of and compliance with the Convention. The Board's expertise in matters pertaining to all issues relevant to the two earlier treaties distinguishes it as the proper vehicle by which to ensure the aims of the new Convention are being carried out by all States party. Further, the Board's status as an independent body comprised of experts serving in their own (rather than governmental) capacity gives it an objectivity essential to ensuring that the Convention is properly implemented.

The U.S. strongly supported the assignment of broad powers to the Board in overseeing implementation of the Convention. This position was based on extensive positive experience with the Board in furthering the aims of the prior Conventions.

In the delegation's view, Article 22 in no way limits the action of the Board to any specific articles of the Convention. The phrase "related to its competence" in paragraph 1(a) gives the Board power to take action with respect to a problem encountered by a party in its ability to implement the Convention. This phrase was added to ensure the Board's power to act on and oversee the Convention was not limited or restricted.

The U.S. interprets paragraphs 1 and 1(a) as affirming all the competencies of the Board with respect to this Convention as well as regarding the Single Convention and the Psychotropic Substances Convention. The chapeau clearly states the non-derogation of functions under the previous two conventions, and it upholds the same power of the Board with respect to this Convention. The Board thus has responsibility and competence over a broad range of actions against illicit traffic including, but not limited to, national coordination, mutual assistance and international cooperation.

Article 23 - REPORTS OF THE BOARD

Final Text:

1. The Board shall prepare an annual report on its work containing an analysis of the information at its disposal and, in appropriate cases, an account of the explanations, if any, given by or required of Parties, together with any observations and recommendations which the Board desires to make. The Board may make such additional reports as it considers necessary. The reports shall be submitted to the Council through the Commission which may make such comments as it sees fit.

2. The reports of the Board shall be communicated to the Parties and subsequently published by the Secretary-General. The Parties shall permit their unrestricted distribution.

Comments:

Article 23 is identical to Article 18 of the Psychotropic Substances Convention, and nearly identical to Article 15 of the Single Convention. The purpose is to utilize the Board's already established competence in providing statistical and analytical information on matters relating to the implementation of the Convention. This article also gives the Board the power to provide observations and recommendations on matters it deems necessary to ensure proper implementation of and compliance with the Convention.

Article 24 - APPLICATION OF STRICTER MEASURES THAN THOSE REQUIRED BY THIS CONVENTION

Final Text:

A Party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic.

Comments:

This provision was included to clarify that the Convention was not intended to act as a "ceiling" in preventing Parties from taking more aggressive measures in dealing with illicit trafficking where appropriate and lawful. It gives each Party the flexibility to negotiate cooperative efforts on the broad range of activities identified in the Convention, based on the policies and practices of each Party, but does not limit measures to only those identified in the Convention. The provision recognizes each Party's sovereign right to adopt measures to counter drug trafficking within its borders as well as the right of Parties to seek cooperation from other governments, regardless of whether they are Parties to the Convention. The U.S. views this provision as recognition that some Parties, particularly those with extensive experience in narcotics control activities, have the right to seek collaboration with other Parties involving measures which may be outside the scope of this Convention or more strict that those provided by this Convention. In this sense, the article recognizes that it is not inconsistent with the Convention for a Party, such as the U.S., to adopt in its domestic law measures that are more strict or severe that those specified by the Convention.

Article 25 - NON-DEROGATION FROM EARLIER TREATY RIGHTS AND OBLIGATIONS

Final Text:

> The provisions of this Convention shall not derogate from any rights enjoyed or obligations undertaken by Parties to this Convention under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.

Comments:

This provision was included to underscore the continuing validity of the early Conventions, especially in regard to issues related to oversight and implementation. The respective roles of the Commission and the Board, as set forth in the preceding articles, was one of the last issues to be resolved during the Conference. This provision, based largely on a U.S. proposal, was intended primarily to emphasize that Parties' rights and obligations under the prior Conventions were not altered by the present Convention, nor were the roles played by the Board and Commission under those prior Conventions.

FINAL CLAUSES AND ANNEX

Article 26 - SIGNATURE

Final Text:

This Convention shall be open for signature at the United Nations Office at Vienna, from 20 December 1988 to 28 February 1989, and thereafter at the Headquarters of the United Nations at New York, until 20 December 1989, by:

(a) All States;

(b) Namibia, represented by the United Nations Council for Namibia;

(c) Regional economic integration organizations which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Convention, references under the Convention to Parties, States or national services being applicable to these organizations within the limits of their competence.

Article 27 - RATIFICATION, ACCEPTANCE, APPROVAL OR ACT OF FORMAL CONFIRMATION

Final Text:

1. This Convention is subject to ratification, acceptance or approval by States and by Namibia, represented by the United Nations Council for Namibia, and to acts of formal confirmation by regional economic integration organizations referred to in article 26, subparagraph (c). The instruments of ratification, acceptance or approval and those relating to acts of formal confirmation shall be deposited with the Secretary-General.

2. In their instruments of formal confirmation, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Secretary-General of any modification in the extent of their competence with respect to the matters governed by the Convention.

Article 28 - ACCESSION

Final Text:

1. This Convention shall remain open for accession by any State, by Namibia, represented by the United Nations Council for Namibia, and by regional economic integration

organizations referred to in article 26, subparagraph (c). Accession shall be effected by the deposit of an instrument of accession with the Secretary-General.

2. In their instruments of accession, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Secretary-General of any modification in the extent of their competence with respect to the matters governed by the Convention.

Article 29 - ENTRY INTO FORCE

Final Text:

1. This Convention shall enter into force on the ninetieth day after the date of the deposit with the Secretary-General of the twentieth instrument of ratification, acceptance, approval or accession by States or by Namibia, represented by the Council for Namibia.

2. For each State or for Namibia, represented by the Council for Namibia, ratifying, accepting, approving or acceding to this Convention after the deposit of the twentieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

3. For each regional economic integration organization referred to in article 26, subparagraph (c) depositing an instrument relating to an act of formal confirmation or an instrument of accession, this Convention shall enter into force on the ninetieth day after such deposit, or at the date the Convention enters into force pursuant to paragraph 1 of this article, whichever is later.

Article 30 - DENUNCIATION

Final Text

1. A Party may denounce this Convention at any time by a written notification addressed to the Secretary-General.

2. Such denunciation shall take effect for the Party concerned one year after the date of receipt of the notification by the Secretary-General.

Article 31 - AMENDMENTS

Final Text

1. Any Party may propose an amendment to this Convention. The text of any such amendment and the reasons therefore shall be communicated by that Party to the Secretary-General, who shall communicate it to the other Parties and shall ask them whether they accept the proposed amendment. If a proposed amendment so circulated has not been rejected by any Party within twenty-four months after it has been circulated, it shall be deemed to have been accepted and shall enter into force in respect of a Party ninety days after that Party has deposited with the Secretary-General an instrument expressing its consent to be bound by that amendment.

2. If a proposed amendment has been rejected by any Party, the Secretary-General shall consult with the Parties and, if a majority so requests, he shall bring the matter, together with any comments made by the Parties, before the Council which may decide to call a conference in accordance with Article 62, paragraph 4, of the Charter of the United Nations. Any amendment resulting from such a Conference shall be embodied in a Protocol of Amendment. Consent to be bound by such a Protocol shall be required to be expressed specifically to the Secretary-General.

Article 32 - SETTLEMENT OF DISPUTES

Final Text

1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the Parties shall consult together with a view to the settlement of the dispute by negotiation, enquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.

2. Any such dispute which cannot be settled in the manner prescribed in paragraph 1 of this article shall be referred, at the request of any one of the States Parties to the dispute, to the International Court of Justice for decision.

3. If a regional economic integration organization referred to in article 26, subparagraph (c) is a Party to a dispute which cannot be settled in the manner prescribed in paragraph 1 of this article, it may, through a State Member of the United Nations, request the Council to request an advisory opinion of the International Court of Justice in accordance with article 65 of the Statute of the Court, which opinion shall be regarded as decisive.

4. Each State, at the time of signature or ratification, acceptance or approval of the Convention or accession thereto, or each regional economic integration organization, at the time of signature or deposit of an act of formal confirmation or accession, may declare that it does not consider itself bound by paragraphs 2 and 3 of this article. The other Parties shall not be bound by paragraphs 2 and 3 with respect to any Party having made such a declaration.

5. Any Party having made a declaration in accordance with paragraph 4 of this article may at any time withdraw the declaration by notification to the Secretary General.

Article 33 - AUTHENTIC TEXTS

Final Text

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention are equally authentic.

Article 34 - DEPOSITARY

Final Text

The Secretary-General shall be the depositary of this Convention.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed Convention.

DONE AT VIENNA, in one original, this twentieth day of December one thousand nine hundred and eighty-eight.

ANNEX

Table I

Ephedrine
Ergometrine
Ergotamine
Lysergic acid
1-phenyl-2-propanone
Pseudoephedrine
The salts of the substances listed in this Table whenever the existence of such salts is possible.

Table II

Acetic anhydride
Acetone
Anthranilic acid
Ethyl ether
Phenylacetic acid
Piperidine
The salts of the substances listed in this Table whenever the existence of such salts is possible.

Comments:

The Final Clauses (Articles 26 to 34) contain standard provisions concerning signature, ratification and accession, entry into force, denunciation, amendment, dispute settlement, authentic texts and obligations of the depositary. Based on a text prepared by the Secretariat (E/CONF.82/C.2/L.16) as an alternative to the Review Group text (E/CONF.82/3), they generally parallel similar provisions of recent multilateral conventions adopted under the auspices of the United Nations and reflect the practice of the United Nations as depositary under such conventions.

During consideration of these clauses in Committee II and the Working Group, four issues concerned the U.S. delegation.

Articles 26 to 28 expressly provide that the Convention may be signed, ratified, and acceded to by (a) all States, (b) Namibia, represented by the United Nations Council for Namibia, and (c) competent regional economic integration organizations. The first and third provisions posed no difficulties. Inclusion of an "all States" formula is in keeping with contemporary international practice and serves to encourage the widest possible acceptance and application of the Convention. Similarly, it serves the broad objectives of a Convention such as this to permit regional economic integration organizations to adhere, when under their constitutive documents they have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by the Convention.

Namibia: Expressly authorizing Namibia, as represented by the UN Council for Namibia, to become a Party did raise a concern. Because Namibia is not yet a State, and because it is problematic to invite the Council for Namibia to accept responsibilities and obligations which it is manifestly incapable of fulfilling, the United States reserved its position regarding the Council's competence to enter into international agreements such as the current Convention. In a statement of explanation at the end of the Conference, the U.S. delegation reiterated its concerns, which had earlier been expressed when the draft final clauses were adopted in the Second Committee, about permitting the Council for Namibia to sign and accede to the Convention when it is not, as an entity, capable of assuming the rights or of carrying out the obligations of the Convention. The delegation noted that the United States has actively participated in efforts to bring about the independence of Namibia as a sovereign State pursuant to Security Council 435, is hopeful that those efforts will soon bear fruit, and would welcome the signature and accession of the State of Namibia to the Convention as soon as independence is achieved.

Reservations: Whether this Convention should contain an article permitting Parties to make reservations was a matter of some controversy during the Conference. The United States delegation was particularly concerned to preclude reservations to the substantive, "core" provisions in order to promote the most effective implementation of the Convention, and it proposed to include an article to that effect. Other delegations strongly advocated adoption of a permissive article. Given a sharp divergence of views on the issue, the Working Group ultimately agreed to omit any article on reservations, thus leaving the issue to general international law, including the Vienna Convention of the Law of Treaties.

At the time Committee II adopted the Working Group's recommendation, the United States made a statement expressing its intent to apply "severe scrutiny" to any reservation proposed by a signatory to the Convention in the light of the inadmissibility under international law of reservations to a multilateral convention that are contrary to its object and purpose. At the close of the Conference, the delegation reiterated this concern in a statement of explanation, expressing its view that a reservation to any of a great number of the Convention's provisions would raise serious questions concerning its effect on the object and purpose of the Convention, which is aimed at creating a uniform common denominator for all States Party with respect to the measures they are obligated to take, so that they may cooperate more effectively in the fight against illicit trafficking.

Amendments: Article 31 generally parallels the amendment provisions of the 1961 Single Convention as amended and the 1971 Psychotropic Substances Convention, except that (a) the mechanism for calling a conference to consider amendments has been slightly modified, (b) Parties have a longer period in which to make known their objections to any proposed amendments, and (c) most importantly, Parties are not bound by amendments unless they expressly consent. The United States delegation opposed the so-called "tacit consent" procedure in the context of this Convention, while acknowledging that it has proven workable in other contexts, because of the breadth and importance of the obligations contained in the Convention; only a few other delegations shared this concern, however, and most actively supported the procedure as proposed in the Secretariat's text. The delegation believes the express consent requirement represents a clear improvement over the 1961 and 1971 Conventions.

Dispute Settlement: There was substantial debate in Committee II over the dispute settlement provisions of the Convention. Two variants were considered. The first would have provided initially for resort to consensual settlement mechanisms, after which either

Party to the dispute could refer it to the International Court of Justice; the second would have made submission to third-party settlement mechanisms optional. Although a majority of delegations favored the latter, the former also had strong support. As adopted, Article 32 essentially represents a compromise between the two, based on a U.S. proposal. It provides in the first instance for the Parties to consult with a view to settlement of the dispute through any means of their choice, including third-party mechanisms, after which either may refer the dispute to the International Court of Justice; however, Parties may "opt out" of the Court's jurisdiction at the time of signature or ratification, acceptance or approval of the Convention. This permits States which, like the United States, are unable to submit to the compulsory jurisdiction of the International Court of Justice, nonetheless to subscribe to the other dispute settlement mechanisms provided by the Convention.

In this regard, it is recommended that, at the time of ratification, the United States exercise its right under paragraph 4 of Article 32, to declare that it does not consider itself bound by paragraphs 2 and 3 of that article.

TEXT OF RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on December 20, 1988, subject to the following understandings:

(1) Nothing in this Treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States.

(2) The United States shall not consider this convention as the legal basis for extradition of citizens to any country with which the United States has no bilateral extradition treaty in force.

(3) Pursuant to the rights of the United States under Article 7 of this treaty to deny requests which prejudice its essential interests, the United States shall deny a request for assistance when the designated authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this treaty is engaged in or facilitates the production or distribution of illegal drugs.

APPENDIX

EXCERPTS FROM HEARING OF AUGUST 2, 1989

The committee met at 9:33 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the committee) presiding.

Present: Senators Pell and Biden.

Also Present: John Bentivoglio, Staff Assistant to Senator Biden.

The CHAIRMAN. The committee will come to order.

The committee is very pleased to welcome today's witnesses, particularly the Attorney General, Richard Thornburgh, and his presence today underscores the importance of the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

This convention marks an important step forward in the fight against drugs. I consider it significant. It is a result of a multilateral effort and an effort that has reached fruition under the auspices of the U.N. In my view this underscores yet again the positive role the United Nations can and does play in world affairs.

Among the vital issues addressed in the convention are extradition, mutual legal assistance, confiscation of assets, and as ratified, the convention could aid significantly the efforts of our domestic law enforcement authorities in their fight against narcotics smuggling.

Unfortunately, I have a previously scheduled markup in another committee of which I am a member and will not be able to be present for today's hearing in its entirety. However, I wish to assure the witnesses I will review their testimony carefully.

And we are particularly grateful for the opportunity to start out right now with our Attorney General, Richard Thornburgh. Mr. Thornburgh, proceed as you wish.

STATEMENT OF HON. RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES

Mr. THORNBURGH. Thank you, Mr. Chairman. We appreciate the opportunity to address the committee today on a subject that I believe to be of vital importance in our ongoing international efforts to effectively deal with what President Bush has rightfully called the scourge of illegal drugs.

I refer, of course, to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which I had the privilege of signing on behalf of the United States last December in Vienna. President Bush recently transmitted the convention to the Senate for ratification, and the administration is hopeful that you will move expeditiously in reviewing it and providing your consent.

At the recent economic summit meeting of the Group of Seven industrialized democracies, President Bush and the other leaders recognized that, "the drug problem has reached devastating proportions." They stressed, "the urgent need for decisive action, both on a national and international basis." And among the measures the leaders resolved to take was the prompt adhesion to, ratification of and the implementation of this new convention.

This convention builds upon earlier United Nations actions and upon the numerous bilateral agreements we have entered into with other countries. It will assist in the eradication of drugs and drug producing laboratories and in preventing the transportation of precursor chemicals from this Nation and others to the drug countries for use in drug production. The convention will also help to hinder the importation of drugs into the United States and prevent the transfer of the profits of the illegal drug trade back to the drug cartels. Finally, it will enhance our ability to extradite drug criminals to the United States for trial.

Although we are scoring an increasing number of successes in the international war on drugs, our combined efforts have not kept pace with the international drug cartels. These crime conglomerates are run by shrewd and vicious drug traffickers who take full advantage of the international character of their multicountry activities to shield their illegal enterprises. These cartel leaders ignore our laws and in some countries, they have so terrorized the legal system that law enforcement is severely hampered.

This new convention will assist the United States and the more than 100 nations who participated in its drafting, including most of the drug consuming as well as the drug producing countries, to further challenge these international cartels.

I do not represent that this document is going to by itself provide the upper hand to participating nations in our war on drugs. It will, however, provide us with enhanced law enforcement tools and can lead to substantial advances in our international cooperative efforts.

Before going into the provisions of the convention, I would like to provide the caucus with some background.

It is important to recognize how significant a development this convention represents in the effort to combat illicit drug trafficking at the international level. Preparation of the convention began 4 years ago under United Nations auspices when the international community came to recognize that stronger and broader measures for cooperative law enforcement were required to combat the growing menace of illicit trafficking.

In 1984, the General Assembly of the United Nations unanimously adopted a resolution endorsing the negotiation of a new multilateral convention to complement the two existing international drug control instruments, the 1961 Single Convention on Narcotic Drugs, amended by Protocol in 1972, and the 1971 Convention on Psychotropic Substances. These two conventions regulated the legal production and distribution of controlled substances, but did not provide an adequate legal basis for addressing and controlling the increased threat from illicit drug trafficking across international boarders.

Let me take a moment to outline the terms of this historic new agreement.

First, it is important to recognize that it is a law enforcement convention providing new tools for police prosecutors and judges from the signatory nations to more effectively carry out their responsibilities across international boarders while preserving each nation's sovereignty.

This convention will lift the veil of bank secrecy, for example, as an impediment to gathering evidence against traffickers and as a method of hiding illicit profits. Governments are also given the tools to seize illicit drug profits and use them as we do in the United States, to enhance our law enforcement efforts.

Second, all the nations signing the convention have agreed to exchange evidence of criminal conduct and to extradite accused traffickers so that safe havens are no longer so readily available. The pact, in effect, tells the cartels that they are not welcome within any of our borders.

Third, the convention provides for the supervision of the manufacturing and sale of essential and precursor chemicals for the production of illegal drugs in terms similar to recently enacted United States legislation.

Fourth, commercial carriers are brought into the drug war through requirements that they make certain that commercial consignments are free from drugs. Law enforcement officials are given the authority to board, search and, if necessary, seize vessels used in the drug business with the consent of the flag state.

Finally, the convention reaffirms the need for aggressive efforts in crop eradication and demand reduction to complement its law enforcement initiatives.

While the convention itself does not alter the laws of any nation, it commits the ratifying nations to the enactment of new legislation where necessary and to increased cooperation among law enforcement officials.

The United Nations Commission on Narcotic Drugs will provide policy oversight, and the U.N. International Narcotic Control Board will play an important role in monitoring implementation of the convention.

Full implementation of this convention would give our children and their children the gift of a world cleansed of drug abuse, a world where governments carry out their responsibilities free of the corrupt influence of drug profiteers, a world where the vicious criminals now in control of transnational drug cartels are behind bars, their networks in ruins and their seized, illicit profits plowed back into more effective law enforcement.

I recognize that this goal will not be achieved overnight and will not be achieved at all without a lot of hard work. This convention, however, makes it far more likely that the nations of the world can work more effectively together toward that common end.

Mr. Chairman, again I thank you for the opportunity to present our strong endorsement of the ratification of this convention, and I will be pleased to answer any questions that you may have.

[The prepared statement of Mr. Thornburgh follows:]

PREPARED STATEMENT OF MR. THORNBURGH

Mr. Chairman and Members of the Committee. Thank you for inviting me to address the Committee today on a subject that I believe to be of vital importance in our ongoing international efforts to effectively deal with what President Bush has rightly called the "scourge" of illegal drugs.

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I recognize that this goal will not be achieved overnight and will not be achieved at all without a lot of hard work. This Convention, however, makes it far more likely that the nations of the world can work more effectively together toward that common goal.

Specific provisions of the Convention are as follows:

(1) Offenses and Sanctions. -- The Convention requires each party to establish as criminal offenses under its domestic law a comprehensive list of activities involved in or related to international drug trafficking. While such offenses already exist under United States law, their adoption by the international community and enactment into the laws of each party will significantly strengthen and unify the sanctions applicable to international drug trafficking around the globe.

Specifically, the covered offenses include: (i) the production, manufacture, distribution or sale of any narcotic drug or psychotropic substance contrary to the provisions of the 1961 Single Convention or the 1971 Psychotropic Substances Convention; (ii) the cultivation of opium poppy, coca bush or cannabis plant contrary to those earlier conventions; (iii) the possession or purchase of any narcotic drug or psychotropic substance for the purpose of illicit trafficking; (iv) the intentional manufacture, transport or distribution of materials, equipment, and substances for the purpose of illicit cultivation, production, or manufacture of narcotic drugs and psychotropic substances; and (v) the organization, management, or enhancing of any of the foregoing offenses. Of equal importance, the Convention specifically requires criminalization of drug-related money laundering, including the conversion and transfer of property derived from an offense, as well as the concealment and disguise of its true nature and source.

Parties are also required, subject to their constitutional principles and basic concepts of their legal systems, to establish as criminal offenses: (i) the acquisition, possession or use of property knowingly derived from the above offenses; (ii) possession of equipment, materials and chemicals knowingly used in illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances; (iii) publicly inciting or inducing others to commit the above listed offenses; and (iv) related offenses of conspiracy, participation, and aiding and abetting.

Each party is obliged to take into account the grave nature of the offenses by making these covered acts punishable by sanctions such as imprisonment, fines, and confiscation. The Convention requires courts to take into account factual circumstances making the commission of the offenses particularly serious, such as the involvement of organized criminal groups,use of violence, victimization of minors, and the fact that the offender holds public office.

Importantly, the Convention provides that the offenses shall not be considered "fiscal offenses," "political offenses," or "regarded as politically motivated" for purposes of its confiscation, extradition, and mutual legal assistance articles.

(2) Jurisdiction. -- Parties are obliged to establish jurisdiction over the covered offenses when they are committed in their territory or on board their vessels or aircraft. Parties may establish jurisdiction over offenses committed by their nationals, committed on board vessels outside their territorial waters which are properly boarded and searched, and with respect to conspiratorial offenses committed outside their territory with a view to commission of a covered offense within their territory.

(3) Confiscation. -- The Convention imposes two sets of obligations regarding confiscation on parties. First, each party is required to enact domestic laws to enable it to seize, freeze, and forfeit all manner of property derived from or used in the drug offenses. Second, the Convention requires each party to assist another party upon request to identify, seize, freeze, or forfeit property within its territory that was used in or is the proceeds of an offense that occurred in the territory of the requesting party. These dual obligations to forfeit drug proceeds and instrumentalities represent a major step forward in removing the profits of illegal drug trafficking from the hands of the traffickers.

Of further importance, the confiscation article requires parties to enable their courts or other competent authorities to order the production or seizure of bank, financial and commercial records necessary to trace, identify, seize, and forfeit proceeds and instrumentalities of drug trafficking. In this connection, it specifies that parties shall not decline to act on the grounds of bank secrecy.

In addition, while acknowledging that the disposition of confiscated property and proceeds is a matter of domestic law, the Convention contemplates agreements between the parties for either contributing the value of confiscated property to intergovernmental bodies specializing in the fight against illicit drug traffic, or sharing the proceeds and property with other parties on a regular or case-by-case basis.

(4) Extradition. -- The Convention amends existing extradition treaties between parties to include drug and money laundering offenses as extraditable offenses and provides that they shall be extraditable offenses between states that do not make extradition conditional on an extradition treaty. While although almost all United States extradition treaties include within their scope drug trafficking offenses, many do not include drug-related money laundering offenses. This provision will, therefore, have an important impact on our bilateral extradition relations.

The United States had hoped to include a broad obligation to extradite one's own nationals in this article. Unfortunately, there was overwhelming opposition from the northern European countries that, for either political or legal reasons, would not accept any provision on the extradition of their nationals, even a hortatory provision. Thus, the article contains no provision on the extradition of nationals. The article does, however, obligate a party to submit the case to its competent authorities for the purpose of prosecution when it refuses to extradite an offender because the offender is one of its nationals or because the offense occurred on its territory or on its vessel or aircraft.

(5) Mutual Legal Assistance. -- The Convention provides a treaty obligation to provide mutual legal assistance to other parties in investigations, prosecutions or other judicial

proceedings in relation to covered offenses. Such assistance includes, inter alia, the taking of evidence, service of documents, executing searches and seizures, examining objects and sites, providing bank, financial and business records, and identifying and tracing proceeds and instrumentalities of crime. Other forms of mutual legal assistance may be provided as allowed by the domestic law of the requested party.

Significantly, the Convention also eliminates bank secrecy as a ground for refusing a request for mutual legal assistance.

To the extent necessary, the Convention amends existing mutual legal assistance treaties to apply to offenses covered by the Convention, thereby including money laundering in the context of illegal drug trafficking. As between parties that are not parties to bilateral or multilateral treaties on mutual legal assistance, the Convention provides a basis for according such assistance, and specifies the procedures to be followed in making and executing requests. Requests may be refused only for limited specified reasons.

(6) Other Enforcement Measures. -- The Convention requires parties to take specific enforcement measures to prevent illicit trafficking across national boundaries. These measures include:

- Controlled Deliveries at International Level
  Each party is encouraged to allow a known shipment of narcotics to pass through its territory without immediate arrest or seizure in order to trace the onward movement of the consignment and to identify higher levels of trafficking organizations.

- Commercial Carriers, Mails, Free Trade Zones, and Ports

  Parties are required to suppress the use of commercial carriers and the mails for narcotics trafficking. Parties must also make efforts in their free trade zones and ports that are no less rigorous than those applied elsewhere in their own territory.

- Traffic by Sea

  The Convention, consistent with the international law of the sea, authorizes a party with reasonable grounds to suspect that a vessel is engaged in illicit trafficking, to board and search that vessel with the authorization of the flag state.

- Diversion of Chemicals

  Parties are obliged to prevent the diversion of precursor chemicals at the national level and to cooperate at the international level.

- Eradication and Demand Reduction

  Parties must prevent the illicit cultivation of and eradicate plants containing narcotic or psychotropic substances. Similarly, demand reduction as an integral drug control strategy is given appropriate emphasis.

- Other Measures

  Parties must establish direct channels of communication among law enforcement authorities; assist in locating and identifying suspects, drugs proceeds and properties and monitor the import and export of narcotic drugs and psychotropic substances.

Mr. Chairman, as you can see, this Convention will provide international law enforcement with much needed tools. We urge the Senate to promptly give its consent to this important international agreement.

Mr. Chairman, it has been my pleasure to address you today, and I am prepared to try to answer any questions you might have.

The CHAIRMAN. Thank you very much, indeed, and your statement will be printed in full in the record.

There are a couple of questions that come to mind, I am sure to your mind as much as to ours. First, are there any offenses established under the convention as criminal offenses which are not already established as criminal offenses under our U.S. law?

Mr. THORNBURGH. Most of the offenses that are set forth as requirements within the convention are already enacted into law in the United States. I am advised that only minor adjustments of no substantive consequence will be required in our present structure of laws to comply with the convention.

The important aspect of the convention is that it will make those laws now a part of our law enforcement fabric in the United States applicable in all the signatory nations complying with the convention.

The CHAIRMAN. Thank you.

The question of the statute of limitations comes up. And I believe in article 3 each party is required, when appropriate, to establish a long statute of limitations period in which to commence proceedings and a longer period where the alleged offenders evaded justice.

What is the present statute of limitations period under our law for offenses established under the convention?

Mr. THORNBURGH. The present statute of limitations for criminal offenses generally under our laws applies to all of the drug offenses that are set forth both in the convention and under our laws and would not require any modification in complying with the terms of the convention.

The CHAIRMAN. Do you think the period should be longer?

Mr. THORNBURGH. Well, as a prosecutor, obviously, I look favorably upon the longest possible limitations period, but I think that our sense is that that has not proved to be a substantial barrier in effective enforcement of the laws now on the books.

The CHAIRMAN. From your own experience, what do you think the odds are, the possibilities are, that we will end up in a degree of cooperation with the Cubans when it comes to interdicting drugs?

I am struck by the fact that they had their own illegal operation, which one can sympathize with, trying to get around our blockade and use the same black methods, whatever you want to call it, to try to ship the drugs back into the United States sometimes in the same plane or the same boat. And it would seem to me they must be serious if they execute the top general and several other people. There is no question that those same people were involved before.

What I am leading up to is do you share my view that the Cubans, if we handle the situation correctly, will cooperate with us in drug interdiction?

Mr. THORNBURGH. Let me state as a general principle that in carrying out an effort against international drug operations, it behooves us to maximize cooperation with any nation that is serious about dealing with the drug problem. The future of our relationships with Cuba in this regard is under consideration at the highest levels of our Government, and I do not want to anticipate what decision might be forthcoming based on a full review of the facts because of the sensitivity of that relationship.

I note, as you have, Mr. Chairman, some recent developments in that regard, but the history has not been promising in our efforts to enlist the cooperation of the Cubans in law enforcement efforts. But that does not mean that we should abandon our careful scrutiny of what may be developing in that nation at the present time.

The CHAIRMAN. I would think the fact that they have executed one of their top generals and several other of their leading figures indicates a certain seriousness about their activities.

Mr. THORNBURGH. Well, again without prejudging what the final determination is in that regard, there is, as you are aware, some speculation that those activities might not have been wholly related to a new-found zeal in the enforcement of the drug laws, but might have other implications within the political structure of Cuba. Again, those are observations not from me, but which have been made publicly and which are the subject of careful scrutiny, as I indicated, at the highest levels.

The CHAIRMAN. I know in a conversation I had with Mr. Castro some months ago, we discussed the question about search and rescue where there is cooperation between the Cuban Coast Guard and ours and the lack of cooperation when it came to drug interdiction. And then after that came these episodes of the execution of the various officials and the possibility that perhaps one level of government was not aware of what was going on because the whole operation of evading our embargo is a black operation, and the same means could have been used going in reverse.

In any case, my own belief as one who was there a few months ago is that it would not take any great effort on our part to get them to cooperate on a specific basis just as I believe they are starting to do now on a more general basis. And I would hope that that view would be circulated in the administration.

Mr. THORNBURGH. Let me say this. I think that from a law enforcement point of view, it is our goal to cooperate to the maximum extent with those countries who exhibit a zeal in pursuing drug traffickers because of necessity. This is not a problem that can be dealt with by one country alone or within the confines or borders of any one country. And the adoption by a substantial number of those involved in or signing the United Nations drug convention would provide a much better framework within which that kind of cooperation could take place because there would be a commitment by each of the signatory and ratifying nations to specific goals and specific utilization of specific techniques.

The CHAIRMAN. Do you think that the safeguards against extradition for political crimes are sufficient? Could you perhaps describe for us the safeguards in the convention that would ensure that extradition requests made pursuant to it are not used to prosecute political offenses?

Mr. THORNBURGH. The intent of the language in the convention, as I understand, it is to ensure that the political exception to extradition obligations not provide an umbrella for protecting drug traffickers. And I think that represents an important consensus by the signatory nations so that in our concentration on bringing drug traffickers to justice in this country using the extradition process, we are not faced with a cover attempt to assert the political offense exception that would frustrate our law enforcement efforts.

Now, again, that as indicated will depend upon strict observance of the provisions of the convention and careful monitoring of the compliance with the convention by interested countries such as the United States.

The CHAIRMAN. Along this line, the same question, extradition to the United States is one of the few fears of the drug kingpins in some of the cartels. Earlier this decade the Colombian supreme court declared an existing U.S.-Colombian extradition treaty unconstitutional.

In light of this experience and the cartels demonstrated willingness to use violence to achieve its ends, do you believe the Colombian Government has the political willpower to ratify the U.N. convention and, more important, to enforce its provisions if it is ratified?

Mr. THORNBURGH. I think in the discussions that I have had with President Barco and with those leaders of the military and law enforcement establishments in Colombia, both during my visit there earlier this year and during their visits to Washington, that they share our strong concern about the drug trafficking activities, many of which are centered in their country.

As the Chairman has pointed out, the existence of private armies in the narcotrafficking establishment in that country has had an intimidating effect upon the effective enforcement of their laws. It is thought in many circles to be accountable for the action by the court in invalidating the ratification of the extradition treaty.

But I think it is also important to point out that the ratification of the convention adopted in Vienna will not necessarily cure that problem in two respects. First of all, in spite of the best efforts of the United States delegation, the convention still does not obligate the signatory nations to extradite nationals, their own citizens, to other countries. Most of the drug traffickers about whom we have specific law enforcement concerns in Colombia are Colombian nationals.

Now, the extradition treaty not yet in force or invalidated by Colombia did enable us to gain jurisdiction over a major trafficker and secure his conviction and incarceration for life without parole.

But the convention in and of itself is not going to provide an instant remedy to the extradition problems in Colombia. That is going to depend upon the ultimate prevailing of the intention of the government to bring that treaty into force and its use between the two countries.

The situation there, in short, is so complicated by the existence of these armed groups that have succeeded in intimidating, I am told, members of the judiciary, the legislature and in some cases, the law enforcement effort in Colombia, as to create a situation of enormous concern to all of us.

The CHAIRMAN. Thank you very much. I have no further questions.

I am very glad to say Senator Biden is here, and he will be presiding from here on out.

Senator BIDEN [presiding]. Good morning, General.

Mr. THORNBURGH. Senator.

Senator BIDEN. In your opening statement, you accurately discuss how the U.N. treaty will improve our ability to track down international drug dealers. And the treaty does have, in my view, some major symbolic importance.

But to follow up on the line of questioning that Senator Pell had begun, what, if anything, can we realistically expect in terms of price and supply of drugs in the United States as a result of this treaty? What kind of tool do you think it really will be for you? I believe it is an improvement, but give us as hardnosed an assessment as you can as to how much difference it is going to make to you.

Mr. THORNBURGH. Well, I think it is more than symbolic importance. Initially I think and would suggest to this committee and to the Senate as a whole that it is vitally important for America to maintain its leadership role in expressing concern about drug trafficking throughout the world. And our important role in the drafting and guiding of the provisions of this convention give us the opportunity to reassert that leadership by rapid ratification of the convention.

As indicated, it is a law-enforcement convention. It is drafted with an eye toward creating a uniform fabric of offenses among the signatory nations. It would cover uncertainties about how the course of law enforcement should be pursued in the money laundering area, for example, where many nations around the world do not have provisions on their books that deal with that particular offense, which strikes to the very heart of the drug cartels' operations. It specifically would deny the defense of bank secrecy in those investigations, which has often frustrated the pursuit of the paper trail that the narcotic traffickers leave in attempting to disguise their illegal activities.

It would create an opportunity for much more effective networking between law enforcement agencies in this country and the other signatory nations because the official imprimatur of each of those nations would be on this convention in terms of encouraging day-to-day working relationships between law enforcement agencies in this area.

Moreover, the expression of consensus about the trafficking in chemicals necessary in precursor chemicals trafficking is nearly as much of a threat to the nations of the world as the actual trafficking in illegal substances themselves, because the narcotics and dangerous drugs cannot be manufactured and cannot be loosed upon the markets of the world without trafficking in those chemicals. And certainly under legislation passed by the Congress last year and the regulations which are now open for comment from the Drug Enforcement Administration, we as a nation have taken important steps to deal with that problem.

But once again, as I mentioned to the Chairman, one of the prime advantages of this convention which largely replicates the criminal sanctions which you and your colleagues and we in the law enforcement community have succeeded in having placed on the books in the United States—replicating those among all the signatory nations of the world will have a distinct advantage in not only securing a uniformity in terms of offenses, but a worldwide consensus which expresses our abhorrence of this type of trafficking.

Finally, I think it is another specific advantage to note that the provisions with regard to extradition and mutual legal assistance treaties are updated in terms of more sophisticated offenses such as money laundering and trafficking in precursor chemicals. Many of our extradition treaties and mutual legal assistance treaties were entered into at a happier time when the specter of drug trafficking and illegal money laundering did not hang over the world, so that at one fell swoop those treaties can be updated and modernized in their application, thereby shortcutting a process that could take decades to approach on a bilateral basis.

Those are some of the specific advantages that I think we in law enforcement would accrue from the ratification by the United States and by the other signatory nations.

Senator **Biden**. I agree they are all advantages.

Let me state my question in a slightly different way. When I came back—and you were kind enough to participate—from holding similar hearings in New York on this subject, several of my colleagues on the drug task force that is operating here asked me what this treaty would actually do from our perspective in dealing with the significant flow of cocaine from Latin America and heroin now from China and Southeast and Southwest Asia as well.

And my question to you is what impact do you think it will have on your actual law enforcement efforts. Do you look at it and see it in terms of being able to allow you to do something different than you were able to do before and that you hope will result in demonstrating it had an impact on the flow of drugs into this country?

Mr. **Thornburgh**. Yes, I do for the reasons indicated.

Senator **Biden**. Well, let's talk about bank secrecy for a minute and money laundering. What exactly are the participating countries required to do with regard to money laundering? It says the convention requires the participating nations to enact money laundering laws and to modify bank secrecy laws to facilitate the identification, tracing and seizure of drug proceeds.

With regard to the money laundering, do they have to enact a specific money laundering law? What exactly do they have to do?

Mr. **Thornburgh**. Well, many countries in the world today, including many of our trading partners in the European community, do not have on their books any statute that reaches the offense of money laundering, that is, taking the cash generated by illegal drug transactions, disguising it and converting it into other financial instruments, and through other financial instrumentalities, often reaching across a number of borders. Without those offenses on the books in those countries, they are helpless in reaching them within their borders or cooperating with efforts that we undertake and have undertaken to try to seize and forfeit and interrupt the flow of those funds.

Senator **Biden**. But you and I both know because of our mutual efforts and the efforts of others, there are money laundering laws, and there are money laundering laws. There are money laundering laws that are essentially useless, and there are money laundering laws that are tough.

Does it merely require them to say we have a law on our books. Look, it says money laundering. It is against the law to launder money. Is there any requirement beyond that to demonstrate that they have a "money laundering" law?

Mr. **Thornburgh**. Well, let me say this, Senator. Obviously, if the most effective money laundering law is on the books and the will is lacking to enforce it, there is no law, no convention, no action that can be taken to deal with that problem.

Similarly, we have to assume that these undertakings are entered into in good faith and that the political will will be forthcoming to see that they are honored.

Enactment of important legislation to deal with money laundering has a good model in these United States. There was a time when we did not have sufficient legislative mandate to reach those offenses in our country. Now we do, and our recent successes in this regard have had a dramatic impact in terms of seizing funds and shutting down those operations.

Again, our opportunity to offer a model to the world is implicit in our ratification of this convention and in the sharing with our counterparts who similarly ratify the convention of the know-how and experience we have acquired in dealing with good money laundering laws or bad money laundering laws.

Senator **Biden**. I am not attempting to be argumentative. Having drafted the money laundering law that we now have, having personally drafted it——

Mr. **Thornburgh**. That is a good one.

Senator **Biden**. Well, I do not know that it is good or bad, but I do know that the banking industry opposed it for 10 years. I do know the reason why we did not get it. I do know the reason why I got my brains beat in legislatively year after year for doing it is because major financial interests in this country wanted no part of it. And they lobbied and they beat up everybody within the political system they possibly could until the drug problem so exceeded their selfish interest that they were beaten.

Now, my question relates to whether or not the countries who are signatories to this are required to have a money laundering law that is of consequence. I think it is clear on its face they are not, but I just want to get it on the record.

Mr. **Thornburgh**. Let me give you a specific example, Senator.

Senator **Biden**. Yes.

Mr. **Thornburgh**. Last December I visited in Switzerland with the leaders of the Swiss banking community to make to them the very point that you have just stated, that their interests and their nation's interests are tied up in interrupting the flow of illegal drug funds through their legal banking system. They had the same kind of objections initially, the same kinds of concerns about the ability of their banking system to operate if these offenses were not treated seriously and if they did not retain the famous Swiss bank secrecy which has been a hallmark of their system.

There is now an effective money laundering statute moving through the Swiss legislative process. There is now an understanding which we utilize in law enforcement that the bank secrecy protection will not be asserted when it comes to major drug and other white collar crime offenses. In the case of Switzerland I think the proof of the pudding as in most cases is in the eating, and that they are moving forward to accomplish these goals.

Can I guarantee that every one of the signatories to this convention will do the same? Obviously not. But I can guarantee that if this convention fails passage and ratification by this Senate, that our leadership role and the ability to exert our political will in this regard will be forfeited.

Senator **BIDEN**. I agree with you.

The reason why, I would respectfully suggest, the Swiss got to the point where you could talk to them is during the Reagan administration in 1983, the Reagan administration sat down with them and then the Congress passed two laws. And we went over as well with the Reagan administration and incrementally started to put on the pressure. And the result was that after a 6-year fight coupled with your persuasive capabilities, they changed their mind.

I am absolutely in agreement with you. It would be a travesty not to ratify this. It must be ratified. But part of the hearing process is to make sure that we lay out an accurate picture to people of what this can do and cannot do. The Government often makes assertions about efforts that are under way that lead people to believe that they are going to be able to deliver something that they may not be able to deliver.

Mr. **THORNBURGH**. I agree completely. I have tried to make that clear in my statement in noting that passage of this convention is not going to overnight improve the climate for law enforcement, but it offers opportunities which can be availed of in the ways I have specified or tried to specify in response to your questions for law enforcement to increase its capability and enhance our cooperative undertakings with others who share a commitment in this area.

Senator **BIDEN**. The U.N. convention explicitly states that bank secrecy shall not be grounds for refusing to render law enforcement assistance, as you have pointed out. At the same time, the convention states that any assistance provided must be consistent with a country's own laws.

Now, in cases where there are two provisions in conflict under the treaty, which will prevail?

Mr. **THORNBURGH**. Well, our reading of the convention indicates that that undertaking with regard to bank secrecy has to be part of the warp and the woof of the law of each of the signatory nations. They cannot say we are going to pass a law that obviates the defense of bank secrecy and then claim that some other law negates that. That would be in my view an act of bad faith.

I think one of the most important provisions from a procedural point of view is the undertaking that in all of these cases, the bank secrecy laws shall provide no defense with regard to seeking evidence of drug trafficking or money laundering offenses or as an aid in the forfeiture of ill-gotten gains or instrumentalities of drug trafficking operations.

Senator **Biden**. That is clearly the intent, and what I am trying to do is find out what is the legal meaning of the phrase in the treaty—and I am paraphrasing—that says that if any provision of the convention turns out to be inconsistent with any other aspect of a country's laws, which prevails?

Mr. **Thornburgh**. Well, you are dealing with over 100 countries who participate in the drafting. They have differing legal systems. Some are code states. Some are common law states. There is no uniform code of criminal law or criminal procedure that reaches into each one of those countries.

And the intention of that was to ensure that any organic provision of the laws of any country is not overridden by a convention, the same kind of restriction that we in the United States are careful to assert when we enter into conventions or treaties.

Senator **Biden**. As you know, there has been a good deal of concern raised about the lack of procedural protections in the new anti-drug treaty and whether the treaty will obligate U.S. authorities to cooperate with corrupt foreign governments. As a matter of fact, at the request of Senator Helms and at the delight of the committee, one of our witnesses today will be someone who will raise that concern. For example, a corrupt government, the argument goes, might be able to request U.S. investigative reports that relate to corrupt officials in that country.

Now, does the U.N. treaty contain safeguards to ensure that U.S. authorities can refuse requests for investigative information from a signatory of the treaty if such request would jeopardize U.S. law enforcement efforts?

Mr. **Thornburgh**. I think we would have no hesitation about asserting that.

Senator **Biden**. Would we be acting in good faith under the treaty? That is the question.

Mr. **Thornburgh**. If the question came to me, our obligation under our Constitution to our citizens would, as indicated, transcend any provision of the treaty.

Senator **Biden**. Let me make sure I understand this now. The treaty requires that there be a sharing of investigative information and reports. And what you are saying is notwithstanding that, if such a request was made from a signatory government, and we believed that by giving them the information the treaty on its face requires it to be given, that we would be within the bounds of the treaty to refuse that because we thought that it might, in fact, do injury to our investigative efforts?

Mr. **Thornburgh**. Well, those are all generalities. What I am talking about is in a specific case if we made a determination that the information requested was not part of a legitimate law enforcement undertaking in an investigation of criminal conduct, I would have no hesitation about refusing to furnish the information. That would largely be a matter between our State Department and the requesting country, but at the first instance, I have no desire or any willingness to compromise the rights of American citizens in an investigation that does not relate to legitimate law enforcement purposes. At the same time, it is important I think for us to recognize our obligation, to furnish that information when it is in the course of a legitimate law enforcement undertaking.

Again, without looking at the facts of a particular case, where you draw the line is obviously going to be a judgmental matter.

Senator **Biden**. So, it is a judgmental matter that the Secretary of State or you, or whomever is asked by the President, can make as to whether or not the investigative body in country A seeking the report relating to criminal activity in country A is or is not necessarily required to be given.

Mr. **Thornburgh**. It is a judgmental matter today. Those are judgments we make in the normal course of our relationships with countries around the world, and it would remain a judgmental matter under the treaty.

Senator **Biden**. But there is no treaty today.

Mr. **Thornburgh**. There are treaties, Senator.

Senator **Biden**. No.

Mr. **Thornburgh**. There are mutual legal assistance treaties under which we make judgments on a daily basis about the furnishing of this kind of information.

Senator **Biden**. That is true, but there are no treaties that I am aware of today that require, as this treaty requires, the transfer of that information. Now, I may be wrong, but I think this treaty requires that to be done, doesn't it?

Mr. **Thornburgh**. Well, it requires it but permits us to resist where we consider that the execution of the request would be prejudicial to our essential interests.

Senator **Biden**. Can you show me where it says that in the treaty?

Mr. **Thornburgh**. That is in article 7, paragraph 16, part B.

Senator **Biden**. I beg your pardon. Now, it is where? I'm sorry.

Mr. **Thornburgh**. Article 7, paragraph 17, subparagraph B. I'm sorry. Paragraph 15, subpart B. "Mutual legal assistance may be refused if the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, order public, or other essential interests." And under the rubric of other essential interests I would certainly include our right to exercise our judgment that this was not a legitimate law enforcement investigation and the rights of American citizens should not be prejudiced by furnishing information of the type you suggest might be requested.

Senator **Biden**. Thank you.

Mr. **Thornburgh**. Let me, if I might, just add one other provision because I anticipate a further objection in this regard that the furnishing of that information to a foreign country might, in fact, compromise an investigation that we were carrying on within our borders. And that is covered by paragraph 17 which says, "Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding."

I regard those as both sufficient safeguards to deal with the threat that you raise about our dealing in the future with countries about whose bona fides we have some doubt.

Senator **Biden**. Thank you.

Does the treaty contain any safeguards to ensure that extradition requests made pursuant to the treaty are not used to prosecute political offenses?

Mr. **Thornburgh**. The treaty addresses the political offense situation in regard to requests that are made for extradition of drug offenders not being capable of resistance on the basis that these are, in fact, political offenses. And that again cuts both ways.

The general extradition treaties between countries that govern the political offense exemption in many cases would be the governing language with regard to the question that you asked. The narrow focus of the convention is design to ensure that no country is able to raise the banner of political offense where a drug trafficking offense is at the heart of the extradition request.

Senator **Biden**. Article 6, section 6, says—and I quote: "In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request."

I assume that is the protection, or am I wrong about that? I see your staff, half of it nodding yes, and half nodding no.

Mr. **Thornburgh**. That is the story of life.

Senator **Biden**. That's right. [Laughter.]

Mr. **Thornburgh**. That does not reach the point that I made. That is the general type of political exception that I think you find in a lot of extradition treaties.

Let me just, because this has to be looked at in all its particulars, refer you to article 3, section 10, which addresses the point that I made earlier. And that reads: "For the purpose of co-operation among the Parties under this Convention, including, in particular, co-operation under articles 5, 6, 7 and 9, offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and fundamental domestic laws of the Parties."

The design of that is to focus on the drug related offenses that are contained within this convention. That is, if a charge or investigation is forthcoming, under those kinds of statutes, you cannot willy-nilly raise the defense to action required under this convention that they are fiscal or political offenses. That does not reach the overall obligation which you pointed out that is designed to prevent a focus on religious, ethnic or other characteristics upon which we, among all nations, would not be comfortable in extraditing persons, as evidenced by recent history.

I think the two fit together well when you focus on the fact that this is a convention designed to reach drug trafficking and drug related offenses.

Senator **Biden**. I think they do too, and I think it is very important we get that in the record to make sure that it is understood up here.

Let me ask you one more question. I know you are very busy, and you have to leave soon.

During the Paris summit, the Group of Seven Nations issued a communique calling for ratification of the U.N. convention and for the creation of a "financial action task force" to negotiate multilateral agreements relating to money laundering and to forfeiture.

And my question is what kind of agreements beyond those contained in the U.N. convention are necessary in your view to make the G–7's statement a reality.

Mr. **Thornburgh**. I would not want to give a broad answer to that, Senator. What I think is important is the expression of mutual concern among these leading European partners of ours which could initiate the kinds of discussions that are now going on with the Swiss, for example, the kinds of discussions that we would hope to see forthcoming in the German financial community and political community, and to utilize the experience that we have had with money laundering and asset forfeiture statutes and make them convertible into the experiences that others would hope to have in following the route that we have in this country.

To be able to give you a rundown on the status of the laws in each of these countries is, quite frankly, beyond my present or probably future capacity. But we do have the ability, through our strong relationships with our law enforcement counterparts, to give them the basis of our experience and to give them what we think would be appropriate tools to implement the desires expressed by the G–7 leaders at the Paris summit.

And I think that is important. And again, I reemphasize—and I know you share may feeling in this regard—that the leadership position of the United States in adoption of this convention, just as the leadership position of the United States in the G–7 initiative, would be to our advantage not only symbolically but in terms of our ability to enhance our cooperative efforts with our partners around the world in the law enforcement community.

Senator **Biden**. The way I read it—and obviously I read my own desires into it. That is a tendency I suspect most of us have—is the paragraph that says, "Accordingly, we resolve to take the following measures within relevant fora." And then it lists a number of things, including support the efforts of producing countries to ask for assistance to counter illegal production or trafficking, and it goes down the list. And it gets to what this treaty attempts to cover in part, that is to "conclude further bilateral or multilateral agreements in support of initiatives and cooperation where appropriate that include measures to facilitate the identification, tracking, freezing, seizing and forfeiture of crime proceeds."

Obviously, the G–7 is aware of the treaty, and that is the reason why I asked the questions in the beginning about money laundering and forfeiture laws. I assumed that this meant that there was an expectation and hope on the part of the G–7 that there could be a good deal more uniformity with relationship to tough—tough—money laundering laws like the one we have in the United States and tough forfeiture laws.

As you well know, from back in the days when you were prosecuting in Allegheny County, we have come a long way on money laundering. It took us the better part of nine years. The Carter administration did not even want to hear about it. They did not even know it existed in the Justice Department at the time. And now the ability to trace assets is about 12 times easier than it was then because the laws changed.

So, that is the reason I asked the question. And it was my hope and expectation that that is what the signatories had in mind, but we will find out I guess.

Mr. **Thornburgh**. There are really two aspects to it, Senator, regardless of how expert you and I are at reading the minds of the G–7 signatories.

Senator **Biden**. I am not expert at all.

Mr. **Thornburgh**. Nor am I.

Senator **Biden**. I was just wishing.

Mr. **Thornburgh**. But there is constant working level cooperation between our law enforcement agencies and their foreign counterparts, specifically to my knowledge with the United Kingdom, with the Italians and with the Swiss during the time that I have been in office, on important cases relating to money laundering. Without that cooperation—money laundering is implicitly an international operation—those cases domestically could not go forward.

Moreover, as I indicated, the discussions that we had on the basis of those cooperative efforts with Swiss authorities and Swiss banking officials about the new money laundering law that they are working on I think will be fruitful in the details of that law and fulfill the hopes that you expressed that that is, indeed, a tough undertaking. And the more of those that are incrementally achieved, the more likely it is that we are going to have a broad rubric of those kinds of laws around the world that can enhance our capabilities in that regard as well as of the nations that adopt them.

Senator **Biden**. If you have time, would you be willing to try one more question? I am told you have to leave by quarter of. Is that right? I think there is a vote in 5 minutes anyway.

Obviously, as you stated, one of the hopes and one of the purposes of our signing this would be not only to maintain our ability to lead the rest of the world in beginning to take a much more serious attitude toward the drug problem which a $500 billion operation is internationally, but also to make an impact. And I am concerned, as I know you are, about our ability to prosecute the ever increasing number of foreign nationals who commit violations of U.S. laws, particularly corrupt foreign officials who are involved in the drug trade.

Now, the new U.N. treaty doesn't, nor am I suggesting should it, solve every problem or attempt to, but it doesn't address the problem of drug related corruption in other countries.

But you are, as you have been successfully attempting to deal with, struggling with this problem as every justice department has. And I wonder whether or not you would support creating a specialized team of U.S. investigators and prosecutors devoted solely to drug cases which involve the extradition and prosecution of foreign nationals, particularly foreign officials. Do you think expertise there is needed? Do you think there is a needed coördination and cooperation with you, Treasury and State?

Mr. **Thornburgh**. Those activities are currently lodged in the Office of International Affairs within the Criminal Division of the Department of Justice, and the extradition process is handled there by persons with considerable experience and expertise and focusing on these problems as a service to United States attorneys and other Department of Justice lawyers who are involved in these prosecutions.

It is an area where considerable expertise is required. It is not necessarily an area where litigation skills are required. So, my own view is that the combination of the expertise in investigation and prosecution of cases drawing upon the established expertise in dealing with the extradition problems is serviceable. But I would be pleased to give further consideration to your suggestion, in effect, that they be combined in a unit that would concentrate on these cases.

Senator BIDEN. I want to be clear. I do not know that they should.

Mr. THORNBURGH. I don't either, but it is worth looking at.

Senator BIDEN. One of the things that I wondered about was the fact, as I understand it, that that unit does not contain DEA or FBI investigators. The investigating component seems to be a little separate, but I am not sure whether it should or shouldn't be.

Mr. THORNBURGH. I think the rationale there—and again I am willing to reexamine this—is that the investigative process and the decision to prosecute for violations of the United States criminal laws is the same regardless of whether you are dealing with a resident of Anacostia or Argentina. You either have a case or you do not. Getting jurisdiction over them, however, by the extradition process kicks in a whole new dimension and, therefore, that dimension is met by the Office of International Affairs with a developed expertise. But we will be glad to look at that.

Senator BIDEN. When a decision is required at that point, and there is tension between or difference of opinion between State and Justice, who calls the shot?

Mr. THORNBURGH. I have not had an occasion where that has arisen, but I will say this, as a general proposition throughout my years of serving as a prosecutor in the Department of Justice, that the obvious instinct of a prosecutor is when he or she has sufficient legally admissible evidence to prove a specific violation of the law beyond a reasonable doubt to a judge and jury, the understandable instinct is to prosecute.

However, all of us recognize that in appropriate cases, prosecution may be obliged to be foregone for legitimate national security purposes. If, for example, a prosecution of an individual would jeopardize a major breakthrough of a peace undertaking, then it is clear that such a prosecution would have to be examined very carefully.

The mechanism considered for those considerations is the President or his designate. It is not a decision I suggest that should be made by the Department of Justice or the Department of State. The arguments should be presented by both of them to the President or his designate for review.

I have not had occasion to do that during my tenure in office, either now or my previous service as head of the Criminal Division, but I acknowledge that such a mechanism has to be utilized in making those fine judgments.

Senator BIDEN. I appreciate that.

I must tell you, never having been on your side of this effort, meaning from the administration's position, as a prosecutor in the Justice Department or the State Department, I have been concerned for the last 15 years that the tendency is on international matters relating to drugs we tend to subordinate the drug efforts to foreign policy judgments and considerations and unduly subordinate them. And I am not expecting you to answer.

Mr. THORNBURGH. Well, I will answer. I can speak only for my charge. I ain't in the foreign policy business. I am in the law enforcement business.

Senator BIDEN. I know.

Mr. THORNBURGH. I take it very seriously. And I would present vigorously to my boss, the President, the arguments for proceeding with law enforcement in every case where the evidence was there. However, as I stated, I clearly recognize that it is the call of the President where in his judgment based on hearing these—this is all hypothetical—arguments that he would make a decision. You and I can both envisage situations where going ahead with a prosecution might——

Senator BIDEN. I can name you a half a dozen over the last 15 years, and it is not so much——

Mr. THORNBURGH. I assume none of them while I have been Attorney General, Senator——

Senator BIDEN. No, of course, not.

Mr. THORNBURGH. Or I would have heard from you before now.

Senator BIDEN. No, there are none since you have been Attorney General that I am aware of. I am speaking more generally. The tendency—and apparently I am not the only one that shares this view—has been—and I am committing a cardinal sin to say this in the Committee on Foreign Relations. We here talk about great issues like treaties and arms control and visits of heads of state. We do not talk about things like drugs and all those dirty things that happen out there. I should not be so facetious.

But really there is an overwhelming tendency in this town and there has been—and maybe you have changed it, but I suspect it will continue—and that is that whenever a foreign policy concern comes up against a drug enforcement effort, the foreign policy concern almost always prevails. Secretaries of State—and I do not mean this Secretary of State—generally would much rather carry arms control treaties in their briefcases or their assistants carry them than plans as to how to deal with international drug cartels.

And ever since I have been here, the one thing that always rankles my colleagues on the committee, whenever there are confirmation hearings on the Secretary of State, I spend about half my time asking the prospective Secretary of State what his views are on drugs because I am absolutely convinced—and I am really going to get myself in hot water here—that the outgoing Secretary of Commerce Mr. von Raab was correct about how the State Department is less than enthusiastic on most occasions to deal with international drug questions. And that is all administrations since I have been here.

Mr. THORNBURGH. Well, I do not want to be disrespectful, Senator, but this does seem an appropriate time to turn the microphone over to my colleague from the State Department, Mr. Levitsky. [Laughter.]

Senator **Biden**. I think you're right. No, let me ask you one last slightly unrelated question.

Some of us, yourself included, have been talking about what may be coming. We, I mean the Government talked about crack cocaine a little bit late, and it reached epidemic proportions in the Bahamas prior to it getting here. We had all the warnings in the world that it was coming.

Now your Justice Department people, and FBI and DEA in New York City, folks tell me that smokable heroin is on the way, that we are about to be inundated in the same proportions with the same devastating effects from what may be incorrectly but maybe more descriptively referred to as crack heroin—and that is smokable heroin. And they pointed out to me at great length that it is having devastating impacts on a number of things, not the least of which is that most of this heroin is coming from and is being distributed through ethnic Chinese control in this country. They add that the Justice Department and DEA and all investigative agencies within the government are woefully unprepared because we do not have the ability to infiltrate these Chinese distribution rings like we do the Italian Americans or Latin Americans because we do not have folks who speak the language and/or who are Chinese in sufficient numbers.

A, do you believe that this problem is likely to be as devastating as is being predicted? And, B, is there any specific action under way in the Department to make up for what is—and I am not being critical—the inadequacy of not having enough ethnic Chinese Americans to be able to work in this field?

Mr. **Thornburgh**. Let me briefly respond in three ways, Senator.

Let's not kid ourselves. No matter what the substance is, the law enforcement task is exactly the same. We must accumulate enough evidence to convict the wrongdoers and to seize as many of their assets and forfeit them as we can. We try to keep abreast as best we can of the changing technology, but regardless of what the substance is, the process of distribution is roughly the same as we will disclose in great detail tomorrow with a comprehensive what I call Dun & Bradstreet of the drug operations in this country compiled by United States attorneys in each of the 93 districts. That business organization, that process of distribution, while it will vary in terms of source countries, within this country is the same and requires the same kind of assets.

Second, the nature and the face of organized crime is changing, and it is one of the reasons that I have suggested the integration of the organized crime strike force offices which were set up to deal with the traditional la cosa nostra and Sicilian mafia into the U.S. attorneys' offices so that they can begin to integrate more closely with the drug enforcement task force operations that are run out of the U.S. attorneys' offices. And we have one focus on these activities which are now not only escalating in the Asian communities, in Asian organized crime, but through the Crypts and the Bloods, the motorcycle gangs, the Jamaican posses, a wide variety of new faces of organized crime that simply cannot be addressed within the current structure that we have.

Third, your question about agents who have the language capability and the cultural understanding to deal with these kinds of problems is a very troubling one. We have had recent litigation over the use of Hispanic agents much needed within our law enforcement capability as translators and as concentrating on cases involving Hispanic speaking and Hispanic cultural groups within this country. We are betwixt and between. On the one hand, we are subject to criticism for utilizing those persons who possess language and cultural skills and restricting their opportunities to progress within law enforcement. On the other hand, we hear from you and others and share a concern that we do not have enough persons with particular language and cultural skills to deal with these developing new areas.

If you can solve that problem for us, Senator, I would be appreciative. But we are troubled by having an equal opportunity suit brought against us by recruiting, for example, more Chinese speaking or Chinese culturally acclimated agents to deal with the problem of Chinese organized crime lest they be restricted in their ability to handle other kinds of work within the FBI, the DEA or other enforcement agencies. We are trying to solve that problem, but I hope you understand what the dilemma is that we face in that regard.

Senator **Biden**. Well, I do. I have a point of view, but I will not bother you with it now because we get a chance to talk often.

I thank you very, very much for your time.

Mr. **Thornburgh**. Thank you.

Senator **Biden**. There is a vote that is taking place now, and I have 6 minutes to get to the floor. Our next witness will be Dr. Bassiouni, Professor of Law at DePaul University in Chicago. Doctor, I have to go and vote. It will take me about 8 to 10 minutes. You are used to this. You have been a witness here before. Welcome. As soon as I get back, we will proceed with your testimony. Thank you.

[Recess.]

Senator **Biden**. The hearing will come order.

Professor, it is great to have you back. You are a delightful witness. You have been with us before, and I am happy to see you back.

As I was saying to you off the record when I walked back in the room, you know the drill of this place, as they say. The Senate will not be in session for over a month beginning August 4, and it seems like we save up everything to be done on the floor of the U.S. Senate for the last moment. We were in till 2 a.m. or thereabouts last night voting, and as you can see, it has started today. And I am told that there may be a cloture vote as early as 20 from now.

So, without further ado, why don't I let you begin in any manner, shape or form you would like. We are anxious to hear from you.

STATEMENT OF DR. M. CHERIF BASSIOUNI, PROFESSOR OF LAW, DE PAUL UNIVERSITY, CHICAGO, IL

Dr. **Bassiouni**. Thank you very much, Senator. It is a privilege to be before the committee once again and to see you again in good health and good spirits.

Senator **Biden**. Thank you.

Dr. **Bassiouni**. I did not have time, unfortunately, because I was notified only too late of my appearance here to prepare a formal written statement, but I sent to the committee staff an excerpt of one of my books dealing with the subject of international control of drugs which I would ask the Chair's permission to include in the hearing record.

Senator **Biden**. Without objection, it will be.

[The information referred to by Dr. Bassiouni follows:]

INTERNATIONAL CRIMINAL LAW: VOLUME I–CRIMES
BY M. CHERIF BASSIOUNI

International Control of Common Crimes and Narcotics

Any international control system must ultimately rest, in the absence of an international enforcement body with coercive powers, on the willful compliance and cooperation of member states of the world community. World community proscriptions will therefore be as effective as world-community participants are desirous of implementing them. The *will* to participate in a global system of control is the only alternative to die-hard imperatives of narrowly conceived concepts of sovereignty and competing international interests. Such a commitment can be attained only after the types of activity and conduct sought to be regulated by world-community proscriptions have attained a certain level of opprobrium in the commonly shared values of mankind. Admittedly there will seldom be a uniform level of values among all peoples of the world, consequently a minimum threshold must be found and the control of narcotics is the best common denominator.

The dangers of drug abuse and particularly dangerous drugs are too well recognized scientifically to be debated, and the effects of drug abuse on the user and on society are also well established. The debates are only as to the extent of the harm and the potential for harm of narcotic drugs. Such a commonly recognized individual and social harm constitutes, therefore, a minimum common denominator warranting if not compelling cooperation between nation-states to combat this type of activity. The dangers of illicit cultivation, manufacture, traffic, and use of narcotic drugs and psychotropic substances extends to all geographic areas of the world. In addition to the individual human harm produced by drug use and abuse, the social harm is even greater. That social harm is caused by the loss of the effective participation and full productivity of the abuser, and the cost to society to assist, support and treat such a person and also the family of such a person. In addition, the enormous profits in illicit traffic in drugs have created greater opportunities for corrupting society through the recycling of illegally obtained funds and their investment in "legitimate" business. The use of profits to further criminal activity, and to corrupt the criminal justice system and the political process are also among the dangers to any organized society.

The obligations which derive from the existence of the contemporary situation of drug abuse are twofold: (1) effective national controls and (2) international cooperation to maximize national efforts. This type of international responsible participation in world-community processes is by no means limited to those nation-states particularly affected by the consequences of the harmful activity but extends to all world-community participants. A direct consequence of this concept is the development of an international obligation to combat such criminality in compliance with the maxim *aut dedere aut judicare*.[1]

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*Reprinted with modifications from an article by the author in 46 *St. John's L. Rev.*, 713 (1972).

[1] *See* M. C. Bassiouni, *International Extradition In U.S. Law And Practice* (2 vols. 1983).

The Development of an International Control System

It should be stated at the outset of any study on narcotics that there is no uniformly recognized definition of the term. Certainly there are numerous writings which provide a pharmacological or psychological classification of substances in terms of their effect on the natural organism. This is the main reason why municipal legislation and international treaties refer to specific substances and drugs rather than attempt a broad definitional classification. The categories of narcotic substances and dangerous drugs covered by international agreements are (1) *opium* and its derivative morphine, produced from the poppy seed; (2) *cocaine*, produced from the coca bush; (3) *Cannabis sativa*, or Indian hemp, known as hashish, marijuana, bhang, and other names, depending on its geographic location, and (4) *psychotropic substances*, which are chemically manufactured drugs and not agriculturally produced.

Not all of these categories have always been the subject of international control and even among these categories only a limited number were included in the original measures which are confined to opium and its derivatives. In 1931, a system of international legislation was established under which new narcotic drugs could be added by decision of an international organ, which would be binding upon all signatory states. This mandatory system applied originally only to certain derivatives of opium and of the coca leaf, but a protocol adopted on November 19, 1948, extended it to all narcotic drugs of whatever chemical structure, including drugs which are made synthetically; the *Cannabis sativa* drugs were, however, not included.

The 1961 Single Convention took over these classifications and included *Cannabis sativa*, but failed to cover psychotropic substances and that is the reason for the 1971 Convention on psychotropic substances.

The international control of narcotic drugs scheme is founded upon twelve multilateral treaties concluded between 1912 and 1972; the most important is the Single Convention of 1961, which came into effect on December 15, 1964 to which amendments were signed on March 24, 1972.[2] The operation of this system of international control rests on national controls to be established and supervised by individual states within their territorial jurisdiction and subject to their constitutional limitations. The narcotics treaties provide that the signatory states are to adopt appropriate legislation, introduce necessary administrative and enforcement measures and cooperate with international control organs as well as with other countries in compliance with treaty provisions.

More than 110 countries are parties to the 1961 Single Convention and participate in the existing international control system. Countries and territories not bound by any or some of these treaties nonetheless abide by them (to some extent) in practice. As a result, universal acceptance of an international narcotic control system has been attained, even though the exercise of effective control measures still leaves much to be desired as witnessed by the increasing volume of illicit international traffic in narcotic drugs.

[2] *See* U.N. Doc. E/Conf. 63/8 (1972) and Waddell, *International Narcotics Control*, 64 *Am. J. Int'l L.* 310 (1970); *see also* for a list of treaties and signatories between 1912-1961, a note by the Secretary-General, U.N. Doc. E/CN.7/504, Annex I, and D. Lowes, *The Genesis Of International Narcotics Control* (1966). *See* Noll, "International Treaties and the Control of Drug Use and Abuse," 6 *Contemp. Drug.* 17 (1977). *See* also S. Chatterjee, *Legal Aspects Of International Drug Control* (1981); L. E. Eisenhower, *International Narcotics Control* (G. Grob ed. 1981); United Nations Division Of Narcotic Drug Staff: The United Nations And Drug Control (1982).

A sense of historic continuity in international cooperation has been achieved and progress toward more effective controls is developing consistently. Each Narcotic Convention benefited from the experience of its predecessor and filled certain gaps while improving previously existing devices. The object of the system is not to eliminate narcotic substances and drugs, because of their medical and scientific importance, but to restrict their use to these purposes. Thus the dilemma of control and difficulty of enforcement lies in finding a way to produce some of these substances and drugs which are necessary for medical and scientific purposes but also to control their production, limit their use, and curb their abuse.

The international control scheme is predicated on an indirect method whereby each state exercises and administers its own control system. But increasingly the appropriate international bodies take the form of a direct control scheme whereby certain powers are vested in these bodies and they are empowered to act directly. Regrettably such an approach has been limited by the xenophobic attitudes of many states. In fact, because of such attitudes only an indirect scheme of international control could have ever developed. This control scheme is predicated on the cooperation of governments and has two essential characteristics: (1) it depends almost entirely on voluntary international cooperation, and (2) it has no coercive powers, only the ability to denounce a violator to the international community and therefore produce a moral deterrent to insure compliance. Nevertheless the increased "administrative" and "policy" powers of the Commission on Narcotic Drugs and International Narcotics Control Board are providing a basis for an eventual direct control system.

Although each international narcotic agreement will be discussed separately in this article, the ensuing remarks will encompass several of these agreements to illustrate the two above-mentioned characteristics of the control scheme.

The Estimate System. The system of estimates was introduced by the 1931 Convention and administered by the Permanent Central Opium Board and the Drug Supervisory Body which were merged by the 1961 Single Convention in the International Narcotics Control Board INCB. They all provided for measures of quantitative control extending to signatory as well as nonsignatory states. The estimate system is intended to limit the narcotics supplies of every country and territory in the world to the amounts needed for medical and scientific purposes. Every state, regardless of whether or not it is a party to any of these Conventions when they were in force, and presently under the 1961 Single Convention, is required to furnish its estimates of narcotics needed for the coming year. If a state fails to send such an estimate, then the competent international body may make the estimate and it is on that basis that the maximum amount importable by that country is established. Though the international body that examines the estimates submitted by governments has never had the power to change them unilaterally, it may make inquiries with respect both to the estimates as a whole and to a particular drug. The record of these international bodies shows that governments generally cooperate in furnishing the requested explanations. Shipments of drugs can be made to a state only within the limits of the estimates furnished by the importing country or made by the international body. The INCB and its predecessor the Permanent Central Opium Board (PCOB) can make a determination that the limit of shipments to any country has been reached and accordingly notify the exporting states, which are then bound not to make any further shipments to that state.

Both the PCOB and presently the INCB control the quantities of narcotics supplied to countries by controlling stockpiling. If it finds that a dangerous quantity of drugs is accumulating in any country, it may recommend that other states temporarily or permanently stop shipments of drugs to that country. It may also make this recommendation if, in comparing the estimates and the statistics furnished by governments, it finds that a country has violated its treaty provisions relating to the maximum amount of narcotic drugs which it may manufacture or import, computed on the basis of the estimates. Although no such recommendation was ever made by the PCOB or INCB, its authority to do so has nevertheless occasionally influenced governments to comply more fully with the relevant treaty provisions.

The 1961 Single Convention continues the practice of the PCOB to request any state, whether party or not party to the 1925 and 1931 Conventions, to explain a condition which, in the view of the Board, indicates an improper accumulation of narcotic drugs.

The Import-Export Certification System. The import certificate and export authorization system constitutes one of the most important institutions of international narcotics control. According to this system, no legitimate shipments can be sent from one country to another without an import authorization from the government of the receiving country and a corresponding export authorization from the government of the sending country. Thus, by controlling the movements of legal drugs, this provision enables detection of any country's exceeding its import maximum.

The Disclosure and Dissemination of Information. Governments provide the international control organs with data and information on which the system depends. These governments maintain an import certificate and export authorization system for foreign trade, furnish annual reports and texts of laws and regulations enacted by them to implement the narcotics treaties, and report seizures of narcotic drugs from the illicit traffic and other relevant data. They notify the United Nations of newly developed substances with possible addiction-producing properties, and are pledged to place under control, drugs which are found by international control organs to have such properties or to be convertible into drugs having such properties. The discovery of new chemicals such as LSD/LSD25 resulted in the 1971 Convention on Psychotropic Substances (discussed below). General compliance has always been the goal of the narcotics control system, but until all countries are bound by the conventions and implement them in good faith, illicit traffickers will operate from the territory of nonconforming states and thus prevent the effective operation of the system. The effectiveness of international narcotics control, however, lies in world public opinion, thus "publicity" will foster compliance with international obligations according to the terms of the various narcotics treaties. While overdramatization by information media of drug addiction, illicit traffic, and other aspects of narcotics control has often been found harmful to the efforts of national and international authorities, publicity given to the lack of governmental cooperation has a salutary effect. Governments are extremely sensitive to any public outcry that they have failed to cooperate in such a social humanitarian activity. Such publicity is intended to be provided by published reports of the organs of international control based on information furnished by governments (annual reports, laws, statistics, estimates, seizure reports) and by discussions in various United Nations bodies and dissemination of general information.

The Role of International Organizations. The League of Nations and the United Nations have been primarily responsible for the administration of the international narcotics control system.

The organs presently functioning within the U.N. are the Commission on Narcotic Drugs (CND), the International Narcotics Control Board (INCB), the Division of Narcotic Drugs (DNC), and the Fund for Drug Abuse Control (UNFDAC). The World Health Organization (WHO) also fulfills a scientific role.

The CND was established by ECOSOC in 1946 as a policy-making commission to succeed the League of Nations Advisory Committee on Traffic in Opium and other Dangerous Drugs, which since 1920 had been the general organ of control. The CND advises ECOSOC on matters pertaining to narcotic drugs and psychotropic substances and develops international legislative initiatives including recommendations to improve U.N. enforcement machinery. It assists ECOSOC in fulfilling the U.N.s functions under the various treaties and supervises the cooperation of the international control of drugs. It consists of 30 members elected from the U.N. member-states and the state parties to the 1961 Single Convention.

The INCB was established by the 1961 Single Convention and replaced two specialized administrative organs, the Permanent Central Opium Board and the Drug Supervisory Body, charged particularly with the supervision of provisions of the narcotics treaties dealing with measures of quantitative control (statistics and estimates). It is to be an independent and quasi-judicial body to supervise the application, execution and enforcement of the treaties. It consists of 13 members elected on an individual basis by ECOSOC. It has its own independent secretariat. INCB administers the "estimates," "statistical systems" under the narcotic drugs conventions and the "statistical return" under the Psychotropic Convention, analyzes government information and balances "supply and demand."

The DND is the administrative and support agency for CND, INCB, UNFDAC, and of course ECOSOC to which all those bodies report. It performs the treaty functions entrusted to the Secretary-General and prepares the necessary reports to the Secretary-General and to ECOSOC.

UNFDAC was established in 1971 as an agency designed to provide professional and technical services to governments. At the time these were deemed to be essentially part of crop substitution programs, but it has since enlarged its scope to become more active in a variety of related areas in the prevention of illicit cultivation and traffic of narcotic drugs. It is a voluntary fund financed by states' contributions.

The Economic and Social Council and the Commission on Narcotic Drugs formulate policies, coordinate activities and supervise the implementation on international conventions and agreements. They make particular or general recommendations to governments on these matters from the World Health Organization.

The technical assistance programs of the United Nations and such specialized agencies as the World Health Organization (WHO) and the Food and Agriculture Organization (FAO) are made available to governments seeking to cope with their particular problems in this area.[3]

The Overall Concept. These observations reveal the degree of reliance of the international control system on the good will of cooperating states, and its gradually developed structures attest to the patience and persistence of those who for years nurtured its acceptance by generally reluctant states. The inarticulate premise of the entire system which spans all of half a century (from 1909 to this date) is to reach agreement by as many nations as possible on attainable objectives. This accounts for the gradualist development of the system and also for some apparent loopholes and known weaknesses which still exist. The conclusion to be drawn is that the process of international compromise is neither easy nor satisfactory but ultimately it is far better than none.

A Chronology of International Efforts to Control Narcotics

Narcotics Control Prior to the League of Nations

The Shanghai Opium Commission of 1909. Thirteen powers with interests in the Far East appointed an Opium Commission which met at Shanghai in 1909. The delegates to the Commission had no power to draw up or sign any treaty, the primary motive for convening the Commission being to discuss the international ramifications of the Chinese opium problem. It led, however, to the signing of the first treaty three years later.[4]

The Hague Convention of 1912. The first international narcotics convention was concluded at The Hague in 1912[5] and established international cooperation in the control of narcotic drugs.

Narcotics Control under the League of Nations

Article 23 of the League of Nations Covenant provided that the members of the League should "entrust the League with the general supervision over agreements with regard to . . . the traffic in opium and other dangerous drugs." The first League Assembly created the Advisory Committee on Traffic in Opium and Other Dangerous Drugs to assist and advise the League's Council in these tasks. Among other duties, the Committee initiated various international legislative actions under the auspices of the League.

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[3] 520 *U.N.T.S.* 204; proposed amendments U.N. Doc. E/Conf.63/18, 24 March 1972; *see also* International Control of Narcotic Drugs, U.N. Publications Office of Public Information, N.Y. (1965).

[4] Until that period, trade in narcotics was legal and encouraged by England, but when by 1909 it was estimated that China had ten million opium smokers, England, strongly pressured by the United States and religious groups, closed the opium trade between China and India. *See* House of Commons Resolution of May 30, 1906, in 158 *Parl. Deb.*, H.C. (4th ser.) 494, 516 (1906). *See also* Renborg, "International Control of Narcotics," 22 *Law & Contemp. Prob.*, 86 (1957).

[5] 8 *L.N.T.S.* 187, 38 U.S. Stat. L. 1912; 6 Am. *J. Int'l L.* 177 (Supp. 1912).

The Geneva Convention of 1925. The Geneva Convention of February 19, 1925, was a great step forward in the control of narcotic drugs.[6] Governments were required to submit to the newly created Permanent Central Opium Board annual statistics concerning production of opium and coca leaves; the manufacture, consumption, and stocks of narcotic drugs, and quarterly reports on the import and export of such drugs (including opium and coca leaves). It also established the system of import certificates and export authorizations requiring governmental approval of each import and export.

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of 1931. The aim of this Convention, signed at Geneva on July 13, 1931, is to limit world manufacture of drugs to its medical and scientific needs.[7] It contains provisions to restrict the quantities of drugs available in each country and territory. Countries bind themselves not to exceed in their manufacture and imports certain maxima computed on the basis of estimates of their narcotics requirements.

The Convention for the Suppression of the Illicit Traffic in Dangerous Drugs of 1936. The Convention for the Suppression of the Illicit Traffic in Dangerous Drugs was signed in Geneva June 26, 1936, and came into effect in October 1939.[8] It was the last treaty on narcotics concluded under the auspices of the League of Nations. The parties undertook to enact measures to prevent offenders from escaping prosecution for technical reasons and to facilitate extradition for drug offenses.

Narcotics Control Under the United Nations

The United Nations considered it an urgent task to take the initiative in a control system which had broken down during World War II. The initiative was taken when, at its first session in 1946, the Economic and Social Council created the Commission on Narcotic Drugs to carry out the functions entrusted to the League's Committee on Traffic in Opium and Other Dangerous Drugs. It was by the Protocol of 1946 that the functions previously exercised by the League under the various narcotics treaties concluded before the Second World War were transferred to the United Nations. The next steps were the Paris Protocol of 1948, which authorized WHO to place under international control any addiction-producing drug, and the Opium Protocol of 1953, which limited the use of and trade in opium to medical and scientific needs.

The Geneva Protocol of 1946. A protocol signed on December 11, 1946, transferred to the United Nations the functions previously exercised by the League under the various narcotics treaties concluded before the Second World War.[9]

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[6] 81 L.N.T.S. 317, 23 *Am. J. Int'l L.* 135 (Supp. 1929).

[7] 139 L.N.T.S. 301; 48 Stat. 1543; T.S. No. 863; 28 *Am. J. Int'l L.* 21 (Supp. 1934), Wright, "The Narcotics Convention of 1931," 28 *Am. J. Int'l L.* 475 (1934).

[8] 198 L.N.T.S. 229, and Starke, "The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs," 31 *Am. J. Int'l L.*, 31 (1937).

The Paris Protocol of 1948. The Commission on Narcotic Drugs, at its first session in November-December 1946, initiated a study of the procedures necessary for bringing new synthetic drugs under control.[10] This resulted in the preparation of an instrument known as the Paris Protocol of 1948. The Protocol was signed at the Palais de Chaillot on November 19, 1948, and came into force on December 1, 1949. It authorizes WHO to place under full international control any new drug (including synthetic drugs) which could not be placed under such control by application of the relevant provisions (art. 11) of the 1931 Convention and which it finds either to be addiction-producing or convertible into an addiction-producing drug.

The Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of International and Wholesale Trade in, and Use of Opium of 1953. With the aim of limiting the production of opium to the quantities needed for medical and scientific purposes, the Commission on Narcotic Drugs endeavored to bring about an international opium monopoly with quotas allocated to the various opium-producing countries and with a system of international inspection.

The principal opium-producing and drug-manufacturing countries, however, could not reach agreement on several important questions, such as the price of opium and international inspection. Consequently, the Economic and Social Council turned to an alternative plan, proposed in the Commission by France, which formed the basis of a protocol adopted by the United Nations Opium Conference held in New York in May-June 1953. The protocol came into force on March 8, 1963.[11]

The 1953 Protocol limits the use of opium and the international trade in it to medical and scientific needs and eliminates legal overproduction of opium through the indirect method of limiting the stock of the drug maintained by individual states.

The Single Convention on Narcotic Drugs, 1961. The Single Convention of 1961 went into effect December 13, 1964.[12] This convention is a milestone in the history of international narcotics control. More than half the members of the United Nations ratified the Convention and a greater number apply its provisions.

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[9] 12 *U.N.T.S.* 180, *T.I.A.S.* No. 1671 and 1859; 61 Stat. (pt. 2) 2230, 62 Stat. (pt. 2) 1796. See also Gregg, "The United Nations and the Opium Problem," 13 *Int'l & Comp. L.Q.*, 96 (1964).

[10] 44 *U.N.T.S.* 277, *T.I.A.S.* No. 2308.

[11] U.N. Doc. E/N.T. 18, *T.I.A.S.* No. 5273, 14 *U.S.T.* 10; see also Lowes, *supra* note 2, and Gregg, *infra* note 12.

[12] U.N. Doc. E/Conf.34/22 (1961); 520 *U.N.T.S.* 204; *T.I.A.S.* No. 6298, 18 *U.S.T.* 1407. For its background, see Engel, "Integration of International Legislation," 45 *Am. J. Int'l L.*, 770 (1951); for an analysis, see Waddell, "International Narcotics Control," 64 *Am. J. Int'l L.* 310 (1970); Gregg, "The Single Convention," 16 *Food, Drug & Cosm. L.J.* 187 (1961); Lande, "The Single Convention," 16 *Int'l Organization*, 776 (1962); for a U.S. position report by the U.S. Dep't of State, see 61 *Am. J. Int'l L.*, 802 (1967). For the Convention's effect on marijuana, see Kingsley, "Effects of the Single Convention on Narcotic Drugs on the Regulation of Marijuana," 19 *Hastings L.J.*, 848 (1968). See also *Commentary On The Single Convention On Narcotic Drugs*, 1961 (U.N. pub. 1973).

The first objective of this Convention was the unified codification of existing multilateral treaties in this field, with the exception of most provisions of the 1936 Convention on illicit traffic which are to be continued. As among parties to the Single Convention, all the other eight treaties cease to exist, and even in the case of the 1936 Convention, its article 9, relating to extradition, is terminated as between parties to both conventions, and replaced by a provision in the Single Convention.

The new treaty simplified the international control machinery and changed the Permanent Central Opium Board and the Drug Supervisory Body into a single unit, the International Narcotics Control Board.

Weaknesses of the Single Convention. These weaknesses can be summarized in the following areas: (1) it rests essentially upon faithful cooperation by all parties in the context of their national decisions rather than upon effective international measures; (2) the limited authority given the international control bodies—the Commission on Narcotic Drugs and the International Narcotics Control Board—is apparently inadequate to halt or even to slow down the increasing illicit traffic; (3) the Convention lacks a precise obligation, machinery, and incentives for preventing overproduction of drugs; (4) it fails to clearly prohibit production of certain medically and scientifically unnecessary substances and drugs; (5) it has no direct controls over the execution of any treaty provision, particularly with respect to production controls which are very indirect; (6) it has no assignment of production quotas or production ceilings; (7) it does not prevent countries from entering into the production market; (8) the denunciation of the Convention is rather facile and operation outside its ambit is possible (to wit the People's Republic of China); (9) there is no international enforcement machinery (Interpol has no jurisdictional authority); and (10) there are no international sanctions applicable to individual offenders.

Convention on Psychotropic Substances, 1971. Strict international controls over LSD, mescaline, and similar substances—including regulations more rigorous than existing controls for other drugs, such as morphine—are provided for in this new international agreement adopted by a United Nations Conference in Vienna, February 19, 1971.[13]

The agreement, known as the Draft Protocol on the Control of Psychotropic Drugs Outside the Scope of the Single Convention on Narcotic Drugs of 1961, covers thirty-two substances having hallucinogenic effects on the human organism, including "pep pills," which stimulate the central nervous system, and barbiturate-type sleeping pills and tranquilizers, which are depressants.

The substances are listed in four schedules annexed to the Convention, which provides for varying degrees of control over the substances in each schedule.

Analysis of the Provisions of the Convention and a Brief Comparison with

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[13] U.N. Doc. E/Conf. 58/6-19 (1961), 1019 *U.N.T.S.*000; *T.I.A.S.* No. 9725. *See* for its history the records of the Commission which, at its 23d session, Jan. 13, 1969, adopted a draft protocol thereafter submitted to governments for comment by June 30, 1969. For text of draft (U.N. Doc. E/4606/Rev. 1, Annex IV (May 1969)), *see* 8 *I.L.M.* 769 (July 1968). *See also* U.N. Doc. E/CN.7/589, *Commentary On The Convention On Psychotropic Substances* (U.N. pub. 1976).

the 1961 Single Convention. The Convention relies on the same scheme contemplated by the 1961 Single Convention, and in fact its provisions are almost alike. It relies on the element of notice by a party that a substance previously uncontrolled should be subject to:

> (i) *require licenses for manufacture, trade, and distribution as provided in article 8 for substances in Schedule II;*
> (ii) *require medical prescriptions for supply or dispensing as provided in article 9 for substances in Schedule II;*
> (iii) *comply with the obligations relating to export and import provided in article 12, except in respect to another Party having given such notice for the substance in question; (art. 7(a))*

It makes, however, more use of the expertise of WHO particularly:

> (a) *that the substance has the capacity to produce*
>   (i) (1) a state of dependence, and
>   (2) central nervous system stimulation or depression, resulting in hallucination or disturbances in motor function or thinking or behaviour or perception or mood, or
>   (ii) similar abuse and similar ill effects as a substance in Schedule I, II, III, or IV, and
> (b) *that there is sufficient evidence that the substance is being or is likely to be abused so as to constitute a public health and social problem warranting the placing of the substance under international control, the World Health Organization shall communicate to the Commission an assessment of the substance, including the extent or likelihood of abuse, the degree of seriousness of the public health and social problem and the degree of usefulness of the substance in medical therapy; together with recommendations on control measures, if any, that would be appropriate in the light of its assessment (art. 2(4)).*

Providing for special means of controlling such preparations, the Convention relies on the same indirect method of the previous narcotics treaties, but some of the escape clauses are however quite noticeable. One such clause is article 3 (2) which exempts countries from certain requirements under articles 8, 11, 13, 15, 16, and 22 whenever the:

> . . . preparation containing a psychotropic substance other than a substance in Schedule I is compounded in such a way that it presents no, or a negligible, risk of abuse and the substance cannot be recovered by readily applicable means in a quantity liable to abuse, so that the preparation does not give rise to a public health and social problem. . . .

Such a finding is made unilaterally by a party seeking the exemption for one or more of the measures of control. Such a party shall notify the Secretary-General of any such decision, of the name and composition of the exempt preparation, and of the measures of control from which it is exempted. The Secretary-General shall transmit the notification to the other parties, to the

World Health Organization, and to the Board, who may, however, make a different finding and advise the Secretary-General, and the Commission shall decide if the substance should be controlled.

The method of record keeping and control, from manufacture to consumption, via distribution warehousing and shipment, is left to each signatory without international control and is, therefore, likely to prove nonexistent or, at best, ineffective. The Commission and the Board undertake essentially the same functions as they do with respect to the 1961 Single Convention. Secretary of State William Rogers in his letter of submission to the President transmitted to the Senate with the request that the Convention be ratified by the United States stated:

> There are a number of significant differences between the two Conventions, including the following. The new Convention does not undertake to control the cultivation of plants from which psychotropic substances may be derived as in the case of the Single Convention with respect to narcotic drugs. Provision is made in the new Convention that assessments by the World Health Organization are determinative as to medical and scientific matters with respect to psychotropic substances. Decisions by the United Nations Commission on Narcotic Drugs to place a new psychotropic substance under control or to change existing controls over a substance must be by a two-thirds majority of members of that Commission as compared with a simple majority of members with respect to controls over narcotic drugs, and such decisions regarding narcotic drugs under the Single Convention are binding immediately upon receipt of the parties of notification thereof. Corresponding decisions under the new Convention regarding psychotropic substances are not binding until 180 days after their receipt; a party may take an exception to such a decision and apply a lower category of controls to the substance. The manufacture, export, import, and use of substances in Schedule I of the new Convention are much more restricted than drugs in the comparable Schedule of the Single Convention. No annual estimates of quantities of psychotropic substances are necessary under the new Convention as in the case of narcotic drugs under the Single Convention. Under the Single Convention preparations containing a drug under control are subject to all the controls to which the drug itself is subject except where lesser controls may be applied after the preparation has been included in Schedule III to that Convention, but under the new Convention a party need apply only certain limited controls to a preparation if the party exempts the preparation, such exemption being subject to replacement by a decision of the Commission to terminate the exemption, subject to further decision of the Commission to terminate the exemption of the preparation from any or all control measures.
>
> The difference between the two Conventions arises basically from the fact that the world community has had over half a century of experience in the application of international controls to narcotic drugs beginning with the Hague Convention of 1912, and has had no such experience with respect to the psychotropic substances; the production

of narcotic drugs is of far more economic and social significance to countries that cultivate the opium poppy and the coca bush than the manufacture of the psychotropic substances is to the manufacturing countries; there are a great many more kinds of psychotropic substances than there are of narcotic drugs, and the quantities of psychotropics manufactured are much greater than the quantities of narcotics manufactured.[14]

The Penal Provisions and Sanctions Approach in the Convention on Psychotropic Substances and the Single Convention. The "territorial principle" of jurisdiction is invoked in both Conventions as it is throughout all of the narcotics treaties, but concurrently, signatories are urged to prosecute or alternatively extradite individual violators on the additional theory of "universality" because violation of the narcotics treaties constitutes an international crime. Article 22 of the Convention on Psychotropic Substances and article 36 of the Single Convention relate to the penal provisions of their respective Conventions. Both articles are identical and state:

> 2. Subject to the constitutional limitations of a Party's legal system and domestic law:
>   (a) (i) if a series of related actions constituting offenses under paragraph 1 has been committed in different countries, each of them shall be treated as a distinct offense,
>   (ii) intentional participation in; conspiracy to commit and attempts to commit, any of such offenses, and preparatory acts, and financial operations in connection with the offenses referred to in this article, shall be punishable offenses as provided in paragraph 1;
>   (iii) foreign convictions for such offenses shall be taken into account for the purpose of establishing recidivism; and
>   (iv) serious offenses heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offense was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given.
>   (b) It is desirable that the offenses referred to in paragraph 1 and paragraph 2(a)(ii) be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the Parties, and, as between any of the Parties which do not make extradition conditional on the existence of a treaty or on reciprocity, be recognized as extradition crimes; provided that extradition shall be granted in conformity with the law of the Party to which application is made, and that the Party shall have the right to refuse to effect the arrest or grant

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[14] Message from the President of the United States, transmitting a copy of the Convention on Psychotropic Substances, signed at Vienna, February 21, 1971, to the Senate, 92d Cong., 1st Sess., June 29, 1971, G.O.P. 65-118, at VII.

> the extradition in cases where the competent authorities consider that the offense is not sufficiently serious.

The two provisions are identical even in their paragraph and subparagraph numbering. They impose a duty upon the signatory state to punish violations of this Convention by making such violations a crime under municipal law, but do not disallow multiple prosecutions and repeated punishment in every territory or state in violation of the principle of double jeopardy (*ne bis in idem*).[15] Significantly, they make conspiracy a crime even though that type of offense is peculiar only to the Anglo-American legal system and those countries which have been inspired by the common law. The penal provisions further provide for a partial recognition of foreign penal judgments with respect to recidivists without regard for the rights of the offender in such cases and fails to set forth the basis for such cooperation between states with respect to the recognition and consequences of foreign penal convictions. The most astonishing observation is that these penal provisions do not require states to include the offense of illicit narcotic traffic (cultivation, manufacturing, sale, transportation, and their derivative operations in their extradition treaties or reciprocal practices). Even when a state agrees to extradite such offenders, the provisions have an astounding escape clause which is that if in the opinion of the state of refuge the offense is "not sufficiently serious," it does not have to extradite the accused offender. Recognizing the principle "universality" by allowing any state wherein the offender may be found to prosecute for the offense as an alternative to extradition, it nonetheless only suggests the "desirability" to make it an extraditable offense. No wonder so few treaties contain such violations in their list of extraditable offenses.[16]

A particularly laudable feature which appears in the Psychotropic Convention is its concern with treatment of drug abusers, even though the promise is likely to remain hollow and its implementation very doubtful in the case of many signatories.

> *Article 22-1*
>
> (b) Notwithstanding the preceding sub-paragraph, when abusers of psychotropic substances have committed such offenses, the Parties may provide, either as an alternative to conviction or punishment or in addition to punishment that such abusers undergo measures of treatment, education, after-care, rehabilitation, and social reintegration in conformity with paragraph 1 of article 20.
>
> Article 20 deals with measures against the abuse of psychotropic substances and requires that:
>
> 1. The Parties shall take all practicable measures for the prevention of abuse of psychotropic substances and for the early identification, treatment, education, after-care, rehabilitation, and social reintegration of the persons involved and shall co-ordinate their efforts to these ends.
> 2. The Parties shall as far as possible promote the training of personnel

[15] M. C. Bassiouni, *Criminal Law And Its Processes*, 126-36 (1969).

[16] For a list of U.S. Treaties, see M. C. Bassiouni, *International Extradition in U.S. Law and Practice*, Vol. II at Booklet 13 (2 vols. 1983).

in the treatment, after-care, rehabilitation, and social reintegration of abusers of psychotropic substances;

3. The Parties shall assist persons whose work so requires to gain an understanding of the problems of abuse of psychotropic substances and of its prevention, and shall also promote such understanding among the general public if there is a risk that abuse of such substances will become widespread.

Such humane understanding has not been prevalent in other treaties, but suggests that overemphasis on punitive and retributive conceptions of narcotics control are giving way to a more scientific approach. This is a major difference in the sanctions orientation of both Treaties since the provision dealing with treatment of addicts in the single convention states, article 38:

1. The Parties shall give special attention to the provision of facilities for the medical treatment, care, and rehabilitation of drug addicts.
2. If a Party has a serious problem of drug addiction and its economic resources permit, it is desirable that it establish adequate facilities for the effective treatment of drug addicts.

The approach is recommendatory, as in the advisability clause on extradition mentioned above, and not mandatory. In a decade there has been no change in the language of the penal provisions and its extradition clause, only the concern over addiction took a more positive tone.

It should be noted that WHO suggested since the fifties that the term "addiction" and "habituation" be replaced by that of "dependence" and has since sponsored many studies on this subject. It had also initiated the use of the term "abuser" instead of "addict." This new terminology was not used in the 1961 Single Convention, but appears in the Convention on Psychotropic Substances and it is not clear if the reason for it was dictated by the differences between the types of drugs covered in the 1961 Single Convention as distinguished from Psychotropic Substances or because of popular acceptance of the conceptual significance of both terms.

The results of scientific tests and pharmacological distinctions between *Cannabis sativa* drugs, opium-morphine, and cocaine are not reflected in either of these Conventions (other than in the schedules) which are primarily penal sanctions oriented and only secondarily treatment-rehabilitation conscious. In this respect the Psychotropic Convention is more attuned to contemporary scientific research findings than its 1961 predecessor. One reason may well be the decade of scientific research that separates both of these conventions.

The 1972 Geneva Protocol Amending the 1961 Single Convention on Narcotic Drugs.[17] On May 20, 1971, ECOSOC called a plenipotentiary conference to consider proposed amendments to the 1961 Single Convention. All signatories were eligible to participate, as well as all members of the United Nations and its specialized agencies. The conference was convened at Geneva and 97 participants were registered, of which 3 were observers.

[17] U.N. Doc. E/Conf.6318 (1972); 976 *U.N.T.S.* 000; 26 *U.S.T.* 1439; *T.I.A.S.* No. 8118.

The amendment process had been initiated by the United States in March, 1971 (as discussed earlier in the text), and in October, 1971, France, Peru and Sweden proposed additional amendments. The amendments proposed were revised and sponsored by 19 nations but shortly before the conference convened, an additional 11 nations became sponsors.

The conference adopted the Amending Protocol by a vote of 71 in favor, none against, and 12 abstentions. It is open to all parties to the Single Convention (or parties acceding thereto) and entered into force upon adhesions by 40 nations on August 8, 1975.

The Amending Protocol continues to rely on the indirect scheme of control depending too significantly on governmental cooperation without direct enforcement sanction or ever independent fact-finding machinery. Nonetheless, it did make certain notable improvements in the present system: 1) Increased competence of the Board; 2) Reorganization of the Board; 3) The Estimate System; 4) Informational Input; 5) Informational Output; 6) Control and Sanctions; 7) Extradition; 8) Technical Assistance; 9) Treatment and Rehabilitation; 10) Preventive Measures.

The Suppression of Illicit Traffic in Dangerous Drugs and Narcotics Under the Present Scheme of International Control

The illicit traffic in drugs and the criminal activities of international traffickers are of concern to the world community. The organizers of the international illicit traffic do not in most cases physically handle any drugs themselves, but instigate, finance, and direct these operations which are carried out by underlings and then diffused to the users by pushers who perpetuate and disseminate these drugs as part of an organized snowballing system.

The international nature of the offense requires the application of the principle of universality of jurisdiction in national criminal legislation and calls for punishment of violators irrespective of their nationality or the place of their crime. Thus, where international traffickers cannot be prosecuted in the country in which they are found, they should be extradited to a country which is willing to try them. However, this is not accomplished by a "desirability" clause in narcotics treaties, but by a mandatory clause coupled with a multilateral extradition treaty as part of the international control scheme.

The 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs introduced the optional principle of universality for adoption by national penal legislation to insure that illicit traffickers would not escape prosecution because of loopholes in criminal jurisdiction. Furthermore, the adoption of national uniform and harmonious penal sanctions is equally necessary to avoid the existing range and disparity of sanctions. The 1936 Convention limited itself to the formulation of rather vague provisions, accompanied by escape clauses, in order to secure adherence by countries which would otherwise never accept stipulations basically different from their national standards. The 1961 Single Convention, besides expressing in weak terms the requirement of extradition of offenders (a provision it takes over from the 1936 treaty), also requires state parties to take action against the illicit traffic and to provide for the punishment of narcotic offenses but does not distinguish between international traffickers, local pushers (dealers), users, and addicts. It requires that parties should make arrangements at the national level for coordinating preventive and repressive action against illicit traffic by setting up special agencies for such coordination and to assist each other in fighting the illicit traffic by exchanging information and legal papers for the purpose of prosecuting offenders. The way these obligations are worded they are no more than a "best efforts" clause. Governments are required to furnish the Secretary-General particulars of each important case of illicit traffic, the source from which drugs are obtained for such illicit traffic and the methods employed by illicit traffickers. This type of data report is wholly ineffective in practice, even though in theory it is useful. The 1972 Amendments alleviate some of these shortcomings but not all.

Governments have recognized after seven decades of narcotics treaties that, in order to be effective, penalties imposed on traffickers must have a deterring effect whereby the penalty overweighs in the eyes of the potential offender the benefits of the prohibited activity. Only recently, however, have all countries enacted prison terms rather than fines for such violations. Some countries have even introduced capital punishment for certain crimes in the illicit traffic of narcotic drugs, especially when minors are exploited or led into addiction. But these measures have largely proved to be ineffective as the number of narcotics users and abusers is on the increase throughout the world. But sanctions without enforcement are useless.

Prevention and enforcement of narcotics violations are still the most cloak-and-dagger undercover activities in existence. They are often the result of years of work involving many persons, some of whom need to maintain their secret identity. Such activities are, therefore, not likely to be printed in the United Nations Secretary-General's Report on "the last catch." But invaluable cooperation between enforcing agencies is relegated to personal exchange of confidences between agents or agencies who have developed some form of working relationship; instead it should be institutionalized, and such relations formalized.

The Commission on Narcotic Drugs reviews annually the general problem of illicit trade in individual drugs as well as the situation of the international traffic on a country-by-country basis. This review is based on information supplied by governments and such other sources as Interpol. Although the seizure reports furnished by governments may show an increase in the quantity of drugs seized in illicit trade as indicating effective control, the recent surveys of the Commission indicate that, on the whole, the illicit traffic is increasing and remains well organized. The links of organized criminality and illicit drug traffic in all its forms is all too well established. The estimated illicit drug traffic is reported to be more than 110 billion dollars a year, with an estimated profit of 25-30 billions. Most of it is used to further the illicit trade, secure "protection" for such activity through corruption and political influence. Furthermore, a substantial portion of these funds is "recycled" and invested in legitimate business and financial activities that ultimately serve a variety of purposes in furthering the illegal ends of such persons. All of these considerations require a new approach to international cooperation.

Recommendations for a New System[18]

The indirect method of control bears its endemic weakness in that its control scheme relies on the willingness and effectiveness of multiple participants in a process in which not all of them share the same degree of concern and interest. These weaknesses, some of them discussed throughout this article, have not been sufficiently addressed by those concerned with the problem. Alternative solutions are hereby proposed.

1. The elaboration of a new Comprehensive Convention regulating *all* aspects of licit and illicit drug cultivation, manufacture, sale, transportation, possession, use, and proceeds deriving from it, whether of natural or chemical origins, including a new international control system and a new system of international cooperation for the prevention, control and suppression of illegal conduct.
2. Giving the INCB as part of the new integrated international control system a monopoly on growing opium and manufacturing and distributing morphine necessary for medical and scientific purposes. All other forms of opium cultivation would be prohibited.
3. Subsidizing countries presently producing the poppy in order to allow alternative crops to be grown by individuals who would be economically adversely affected by the scheme of integrating UNFDAC in the new integrated international control system.
4. Vesting the CND as part of the newly integrated international control system with powers to regulate with competent local agencies the manufacturing and distribution of psychotropic substances and supervising local agencies in their controlling activities to insure compliance with the regulating scheme.
5. Continuing the system of reporting, certification, and estimates already in operation but with direct sanctions power in the CND.
6. Vesting INTERPOL with the characteristics of a true international police with the necessary technical and scientific means to carry out this function, endowing it with the right to participate with local authorities in arrests, searches and seizures, and other techniques of law enforcement along the model of a federal police system, and having it function as one of the supervisory bodies of the international agency.
7. Fostering uniformity among national penal laws and the treatment of abusers on the basis of a proposed model statute attached to the comprehensive convention that could be adopted by each state according to its national legal system.
8. The inclusion in the Comprehensive Convention of an Additional Protocol in the form of a treaty-statute on extradition and mutual assistance and cooperation between states.
9. The Comprehensive Convention would also have a separate Additional Protocol on international cooperation for the prevention recycling of funds illegally obtained from illicit drug traffic.
10. The Comprehensive Convention would also set minimum standards for the treatment of drug addicts and abusers.

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[18] See also Bassiouni, "Transnational Control of Narcotics," 1972 *Proceedings of the American Society of International Law*.

Dr. **Bassiouni**. Thank you.

Since 1912, there have been 11 international conventions in the area of control of drugs, each one of these conventions succeeding the other and seemingly adding something to the block-by-block building process of establishing an international system for the control of drugs.

It must be clearly understood that the entire thrust of this development, including the thrust of this convention, is to pursue what I call the indirect enforcement system, that is, to place obligations upon states that states are expected to carry out, and then after that, to have the enforcement mechanism flow through the cooperation of states.

The questions that you asked the distinguished Attorney General during his testimony illustrate some of the problems following an indirect enforcement system whereby provisions in a treaty are left subject to, first, the development of national legislation in each country, second, to the capability of each country to enforce that legislation within its own domestic framework. Consequently, there are many difficulties, as we have seen in the course of time, with the indirect enforcement system to have treaty provisions that require states to develop national legislation and to enforce it in view of the fact that it is very difficult to have international standards that are commonly accepted by all countries.

The best example is what you alluded to, Mr. Chairman, in the course of your questions with respect to the legislation on money laundering. The comprehensive convention, which is before us, merely requires a state to enact that legislation. What would be helpful in the future is the ability to develop draft national legislation which I assume the technical services of the Division of Narcotic Drugs or other agencies may develop, and hopefully such draft national legislation could be helpful to some countries.

But there is nothing that will guarantee that the legislation will be, in fact, adopted in a way to be enforceable effectively, as you call it, in a tough way. And second, as the Attorney General aptly puts it, that will largely depend on the political will of the different countries to do so. So, we have to realize that still operating within the confines of this type of indirect enforcement system, it is going to be very difficult to have measures in a convention that will be strong enough to have the effect that we expect to achieve.

Unfortunately, we have not gotten to the point where the world community is willing to develop a direct enforcement system, such as the creation of an international criminal court either at the international or at the regional level, or the development of a convention that would have all these provisions in it so that in addition to the provisions of the convention, we would have the type of legislation on extradition, mutual legal assistance, tracing of funds, forfeiture of funds that would be attached to the treaty so as to achieve some type and level of uniformity.

I fully recognize, of course, all of the political difficulties that are encountered in the international arena by trying to have anywhere between 120 and 140 countries agree to these types of provisions, but I think that we have to realize that the type of treaty we are dealing with is one that inherently has this flaw.

It is also important to bear in mind that this is the first of the 13 international treaties that we have developed so far in modern times that is really devoted or devoting itself to the enforcement aspects. All prior treaties dealt with regulation mostly of licit cultivation as opposed to illicit cultivation. Only in the 1961 convention, as amended by the 1972 protocol, and the 1971 convention do we start seeing some enforcement provisions. But these enforcement provisions obviously needed amplification, and we see, for example, that a single article dealing with extradition in these conventions has now become the object of an article in this convention which is much more expanded and goes much more into detail.

I would like to point out in a rather eclectic form certain matters which I would like to draw the attention of this committee to.

The first is that the treaty states that in the absence of an extradition treaty or a mutual legal assistance treaty, the parties may rely on this convention. If that is the case, then let me strongly recommend to the committee to have a declaration attached to the treaty that would provide that if this treaty is relied upon, outside any other treaties that the United States may have, bilateral or multilateral, that the provisions of the U.S. Constitution would apply.

I am saying that because if reliance is made by the United States on this treaty and therefore not subject to a bilateral treaty, we might have a problem insofar as the question of probable cause is concerned. Some may interpret the treaty as not requiring probable cause under the fourth amendment and we would have a constitutional issue that could arise and take some time in litigation. I am convinced that the Constitution would be supreme. However, I think it is important that such a declaration be attached.

In any event, I also——

Senator **Biden**. Excuse me, Professor.

Dr. **Bassiouni**. Sure.

Senator **Biden**. That is not an unusual practice for us, is it, to add such language?

Dr. **Bassiouni**. No, it is not. There have been particularly reservations and declarations to the Genocide Convention that made the convention consonant with the U.S. Constitution.

I would also like to draw the attention of the committee to one important aspect of the forfeiture provisions which is so broad that in my judgment it really affects the Sixth Amendment right to counsel in that it would lead to the forfeiture and seizure of assets in the hands of defense counsel and would strongly impede the right of counsel. And I would strongly suggest that at least the declaration concerning the applicability of the Constitution also specify not only the Fourth Amendment with respect to extradition requests, but also the Sixth Amendment with respect to the right to counsel.

I think it is also important to note that the provisions regarding mutual legal assistance are really one way, that is, that it is the government that has the right to use these provisions and mutual legal assistance and requests a foreign government or a foreign government may request the United States for information. But defense counsel does not have access to it. And it seems to me that the basic principle of fairness and equality of arms would require that there be equal access to this method of securing evidence overseas to the defense in order to be able to have at least some type of parity in the process.

Senator **Biden**. May I interrupt you there?

Dr. **Bassiouni**. Sure.

Senator **Biden**. Under our criminal procedures, wouldn't that information, if that information was made available to the state, meaning the U.S. Government, automatically be available to the defendant if it was made available to the state?

Dr. **Bassiouni**. I think the Senator is referring to the discovery procedures——

Senator **Biden**. Yes.

Dr. **Bassiouni**. The availability of evidence that would be obtained from a foreign government would be made available under discovery. There are a number of problems there.

In the first place, the U.S. Government as the requesting state would probably not request exculpatory evidence from a foreign government. It would request the type of evidence it may feel would help in the prosecution and therefore, as it receives this type of evidence, if it does not include the exculpatory evidence the defense may wish to have, there is no way the defense may have access to it through this governmental channel.

Senator **Biden**. Right now defense counsel and defendant would have no access to that information at all under any circumstances.

Dr. **Bassiouni**. That is correct.

Senator **Biden**. And so, I guess what I am wondering, is not defense counsel, quite frankly, in equally as strong a position as the Government is in being able to have access by application for production of evidence that the State has?

Dr. **Bassiouni**. Well, both sides, of course, may request letters rogatory and obtain evidence through this mechanism. In the case of the existence of mutual legal assistance treaties, the United States may use the mutual legal assistance treaty to ask another government to produce the type of evidence the United States requests. Once that evidence is obtained, the U.S. Government as a prosecuting agency may decide whether or not to use it.

Senator **Biden**. Well, to be more precise, whether or not they decide to use it, if any of it could in any way impact upon the innocence of or give credibility to the position taken by the defendant, it must be produced, No. 1.

No. 2, if it is going to be used, if as you say they seek only that which will help them, then the defense has the ability to know in advance through not merely discovery and interrogatories, as you know but production. There is a request to the court to produce and under the Brady Rule that information must be produced.

So, I guess what I am saying is I do not see how access to this information from abroad in any way puts a defendant at a disadvantage.

Dr. **Bassiouni**. May I give you two examples, Senator? In one case, which is an actual case that took place in Florida, a defendant was incarcerated. It was a tax evasion matter. The U.S. Government was able to obtain evidence from the Swiss Government with respect to his tax records. In order to exculpate himself, he needed to obtain his business records. While in jail, he could not obtain his business records. Switzerland has some regulations that prohibit removing of the business records. He could not himself leave the United States, since he was in jail, to get the evidence. The only way he could get it would have been to turn to the United States attorney and say please use the channels of mutual legal assistance to obtain these business records for me so I can show that even though you have those bank records that may indicate that I engaged in tax evasion, my business records will prove otherwise. This is one example.

Another example is a case that is I think still going on in Ohio where the government sought evidence again from Switzerland with respect to bank accounts. It turned out that the government made certain representations in the request. The evidence turned out, and based on that, there were some innocent bystanders who were enclosed in the information that the Swiss Government sent over. The United States then prosecuted those individuals on the ground that this was a violation in the United States.

There was no way that the defendants in this case could have access, A, to what the U.S. Government requested, B, to the representations of the U.S. Government and, C, to any other exculpatory evidence which the U.S. Government did not have because they did not request it, and the Swiss did not volunteer it. So, there are many instances at which the defense is put at a disadvantage.

I think the only question I am bringing to your attention is if the use of mutual legal assistance in this treaty and in other forms is going to continue to expand—and I think it should—then I think that we should be conscious of the needs of the defense to have equal access to the same procedure, to have the government obtain from a foreign government evidence which the defense may feel is exculpatory.

Senator **BIDEN**. Thank you, Doctor.

Dr. **BASSIOUNI**. I think it should also be noted—and this is something that nothing can be done about—that there are a number of different policymaking bodies within the United Nations both of which seem to be represented in this treaty. And one is the Commission on Narcotic Drugs and the other is the International Narcotics Control Board.

Unfortunately, this is a difficult situation because the International Narcotics Control Board was created by prior treaties and it is now being continued. But the INCB is a creature of the treaty and not an organ of the U.N., and therefore it answers to the signatory parties to the treaties.

The Commission on Narcotic Drugs is a creature of the Economic and Social Council of the United Nations.

So, you really have two different organs, one of which is a treaty created organ, the other one is a U.N. created organ, both of which have some policymaking functions here.

And there is a problem—and this really does not affect the treaty, but there is a problem of having two bodies represented in the treaties in addition to other bodies within the U.N., such as the United Nations Fund for Drug Abuse Control, all sort of operating within different bureaucratic contexts. And I think the multiplicity of these agencies and bureaucracies goes against the efficiency and effectiveness of a more centralized system.

This is really a continuation of the problem of the idea of the indirect enforcement scheme with different bureaucratic structures, each having their different say so about it.

With respect to the question of the tracking of the funds, as you had asked the Attorney General before—and his answers were very clear—there is, of course, a problem in the tracing and tracking of the funds. There is no system of enforcement for the tracking and tracing of the funds. I suppose one can try to be utopian and think of the creation of an international monitoring system for the movement and flow of funds from one country to another that might be a substantial step forward, but in the absence of that, I think that the provisions which we now have are a step forward, but I do not think that we should expect much out of them.

Finally, I would like to draw the attention of the committee to the provisions on the disputed resolution between the parties. As I read it—and I certainly am willing to stand corrected by the Department of State on it—it appears that this provides for compulsory jurisdiction of the International Court of Justice at the request of one party. The provision of the treaty stipulates that in the event of any dispute between the parties, that the manner in which the dispute shall be resolved is by submission of any of the parties of the dispute to the International Court of Justice.

I am personally delighted with the provision. I would like to see the International Court of Justice have more business, and to resolve disputes of the sort is certainly a great advantage. It does sound, what should I say, somewhat incongruous with the prior positions of the United States, particularly with respect to matters involving Nicaragua and the position of the United States with that dispute.

Senator **Biden**. Well, on that last point, Professor, it has been pointed out to me by staff that the transmittal letter from Mr. Bartholomew says, "It is my recommendation that, at the time of ratification, the United States exercise its right under paragraph 4 of that Article to declare, by means of reservation, that it does not consider itself bound to submit to compulsory jurisdiction of the Court in respect of disputes arising under this Convention."

Now, I quite frankly sometimes wonder about the legal implications of letters of transmittal when they recommend that the United States enter by means of reservation. Apparently under article 4 that is totally appropriate for us to be able to do or any nation to be able to do. So, at a minimum, it seems as though the State Department has recognized your concern, maybe in part because you raised it and others raised it. But they recognized the concern.

If that, in fact, occurs, if the U.S. Government exercising its rights under paragraph 4 of that article, meaning article 32 of the convention, does declare by means of reservation that it is not bound, that it is not automatic, that it is not required, to submit to compulsory jurisdiction, does that eliminate or allay your concern on the last point?

Dr. **Bassiouni**. Yes, it certainly does. I think that a reservation in this case would be certainly appropriate.

Senator **Biden**. Now, all of the issues you have raised have some saliency, it seems to me.

But let me ask you slightly broader questions. Do you still believe that we should have a model international penal law that every country adopts? I believe that was a notion of yours. Is that still your point of view? It is not directly related to this.

Dr. BASSIOUNI. Well, I think—and I have proposed to the United Nations a draft international criminal code, and the draft international criminal code would codify all of the 22 international crimes which we now have. To bring this to focus here, let me give you an example.

We now have this comprehensive convention that will enter into effect. We will have a number of countries ratified. Let's assume for the sake of argument that we have 60 countries that ratify it. We then now turn back and look at the number of countries that have ratified the 1971 Psychotropic Convention. Then we have the 1961 convention with over 120 ratifications and lesser ratifications for its amending protocol of 1972. But we still have countries that are bound by the 1953 Opium Convention.

So, as we look back, we have unfortunately a mosaic of conventions. Indeed, we have some countries that are bound by the 1948 convention. So, you may have a number of conventions to which different parties are bound and it becomes a hodgepodge. The codification would put it all together.

Senator BIDEN. So, it does not move quite the direction you are looking to.

They need me on the floor, but I can do it by the phone I hope. If we can recess for a few minutes so that I do not have to actually recess the hearing, because I would like to ask you a few more questions, if you would be willing.

Dr. BASSIOUNI. Sure.

Senator BIDEN. Do you have time to stay?

Dr. BASSIOUNI. Yes, of course.

Senator BIDEN. Let me see if I can do it from here.

[Recess.]

Mr. BENTIVOGLIO. The hearing is recessed.

[Whereupon, at 11:53 a.m., the committee was adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

RESPONSES BY MR. THORNBURGH TO QUESTIONS ASKED BY SENATOR PELL

1) (Question from Senator Pell) Articles 12 and 13 -- Chemicals and machinery.

Status of U.S. regulations. Title VI of the Anti-Drug Abuse Act of 1986 contains provisions requiring the Attorney General to issue regulations to limit the availability of certain chemicals and machinery that can be used in the production of narcotics. When will this list be ready, and will it encompass the substances listed in Tables I and II of the Convention's Annex?

-- What machines, if any, have been identified in the review process of putting together the list required by the Anti-Drug Abuse Act?

Answer: The chemicals covered by the Article 12 are listed in the Annex to the Convention. Table I includes six chemicals that have relatively narrow uses and are traded in limited volume on the international market: ephedrine, ergometrine, ergotamine, lysergic acid, 1-phenyl-2-propanone, and psuedoephedrine. Three of these chemicals are precursors to LSD and three are precursors to amphetamine and methamphetamine. Table II also has six chemicals but these are chemicals that have a wide range of uses and are traded in large quantities: acetic anhydride, acetone, anthranilic acid, ethyl ether, phenylacetic acid, and piperidine. These include chemicals used in the processing of heroin and cocaine and chemicals that are precursors to methaqualone, amphetamine and PCP.

The two lists were created because the differences in the uses of the chemicals in question, the volume of trade, and the ability to set up effective monitoring systems. Table I chemicals have specific uses and are traded in the international market on a much smaller scale than Table II chemicals. Table II chemicals also have much broader uses. This allows for a dual system of controls with general controls on all listed chemicals and a more stringent set of controls over a limited group of them.

The provisions of Article 12 are consistent with U.S. policy with regard to monitoring the trade in chemicals used in the illicit production of narcotic drugs and psychotropic substances. The recent enactment of the Chemical Diversion and Trafficking Act of 1988 puts the U.S. in a position of meeting or exceeding all the requirements of this Article. In fact, the provisions of this article closely parallel the original Administration proposal for the Chemical Diversion and Trafficking Act in the "Drug Free America Act of 1984."

The lists of chemicals covered by Article 12 and annexed to the Convention are more limited than the list included under U.S. law. All the substances included in the Convention are covered under 21 U.S.C. § 802 or, as in the case of Lysergic acid and phenyl-2 propanone, under control in the schedules of controlled substances.

Article 13 pertains to the prevention of the utilization of common materials and equipment in the illicit manufacture of narcotic drugs and psychotropic substances. Experience has shown that a variety of equipment including glassware, mixing tanks, tableting machines, encapsulating machines, dryers, and other specialized and non-specialized equipment are an intrinsic part of the illicit manufacturing process. In many cases the equipment used is specifically designed for legitimate drug manufacture but diverted into illicit activities. In addition to equipment, a variety of materials such as binding agents, gelatin capsules, and ordinary chemicals are also used in the illicit manufacture of drugs of abuse.

For more than a decade, the United States has participated in voluntary programs with various industries to identify unusual purchases of these types of equipment and materials. Since the inception of the Controlled Substance Act, the manufacture, distribution, or possession of punches, dies, and other manufacturing equipment utilized to counterfeit controlled substances has been prohibited under 21 U.S.C. 843(a)(5). The Chemical Diversion and Trafficking Act of 1988 places additional controls, under 21 U.S.C. 830, over transactions involving the distribution of tableting and encapsulating machines. It also provides for additional penalties, under 21 U.S.C. 843(a)(6) and (7), for the possession, manufacture, distribution or import, for illicit purposes, of such items as three-necked flasks, tableting machines, encapsulating machines, and other equipment.

Article 13 has two basic requirements. First, it obligates Parties to take measures as they deem appropriate to prevent the illicit trade in and diversion of materials and equipment used in illicit production of narcotic drugs and psychotropic substances. Second, it mandates that Parties cooperate in these efforts.

There is no need for any legislation to meet these requirements. The United States has been a leader in this field for over two decades. Even before the passage of the Chemical Diversion and Trafficking Act, U.S. law exceeded by a great margin the requirements of this Article. By contrast, many other nations lack such provisions and the benefit of the Article lies in the fact that, by adhering to the Convention, those countries will have to adopt effective provisions in this area.

RESPONSES BY MR. THORNBURGH TO QUESTIONS ASKED BY SENATOR HELMS

2) (Question from Senator Helms) Doesn't this Treaty function as an extradition treaty between ratifying states who otherwise do not have an extradition treaty with one another?

Answer: The structure of the first four paragraphs of the extradition article parallels similar structure in the Single Convention and in the Psychotropic Convention as well as language in other multilateral conventions on criminal conduct.[1] These provisions are designed to ensure that the criminal conduct which is the subject of those conventions is considered extraditable conduct by the Parties, whatever the nature of their extradition relationship.

Paragraph 3 recognizes that a Party which requires a treaty basis for extradition may consider this Convention as that required basis. The United States, however, relies on its bilateral extradition treaties to grant extradition.

The final sentence of paragraph 3 requires a Party which needs detailed legislation to use the Convention as an extradition treaty to consider enacting such legislation. This provision is a new one not contained in any of the other multilateral criminal conventions. It is an obligation only to consider, not to enact, such legislation.

3) (Question from Senator Helms) Relating to Article 6, Section 5, should this be interpreted to mean that the Constitution will always apply in all cases where other states make extradition requests of the United States?

Answer: For the United States that does, of course, refer to Constitutional requirements and limitations. It also refers to U.S. domestic law found in statutes, judicial precedents, and bilateral extradition treaties.

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[1] Article 36(2)(b), Single Convention; Article 22(2) (b), Psychotropic Convention; See also Article 8(1)-(3), Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) of December 16, 1970, 22 U.S.T. 1641; Article 8(1)-(3), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) of September 23, 1971, 24 U.S.T. 564.

4) (Question from Senator Helms) Mr. Attorney General, where are the compulsory aspects of this treaty that will insure compliance by all parties in every situation involving narcotics matters?

Answer: International law requires good faith compliance with treaties. The Convention does provide for oversight by two international bodies, the International Narcotics Control Board (the Board) and the Commission on Narcotic Drugs (the Commission). Article 21 authorizes the Commission to review the operation of the Convention and to make suggestions and general recommendations. Article 22 gives the Board a broad mandate to oversee the implementation of and compliance with the Convention. The Board's expertise in matters pertaining to all issues relevant to the two earlier prior treaties distinguishes it as the proper vehicle by which to ensure the aims of the new Convention are being carried out by all States party. Further, the Board's status as an independent body comprised of experts serving in their own (rather than governmental) capacity gives it an objectivity essential to ensuring that the Convention is properly implemented.

Finally, Article 32 provides for two alternatives for the settlement of disputes relating to interpretation or application of the Convention. It provides in the first instance for the Parties to consult with a view to settlement of the dispute through any means of their choice, including third-party mechanisms, after which either may refer the dispute to the International Court of Justice. It also provides that a Party may declare that it does not consider itself bound to submit to the compulsory jurisdiction of the Court in respect of disputes arising under the Convention. Article 32 further provides that any Party having made such a declaration may at any time withdraw it. The Administration has recommended that, at the time of ratification, the United States exercise its right to opt out of the compulsory jurisdiction of the Court.

5) (Question from Senator Helms) We were assured that MLATS would be made only with democratically-elected governments. Isn't this treaty open to everyone, including countries which are neither democratic nor which subscribe to minimal notions of the rule of law?

Answer: For the record, the Administration is unaware of the assurances referred to in this question being given by any Administration official in either oral or written form. Nor does any Administration official recall the issue of whether Mutual Legal Assistance Treaties should or should not be negotiated with other than democratically-elected governments being raised or discussed.

It is noted, nevertheless, that while the Convention is open to signature by all states, there are sufficient safeguards contained in the agreement that would permit the United States to refuse to execute or to postpone the execution of a request so as to protect our being a party to a miscarriage of justice. Particular reference is made to the provisions in Article 7, paragraphs 11 (the "requested Party may request additional information"), 13 (the "requesting Party shall not transmit nor use information or evidence furnished by the requested Party . . . without the prior consent of the requested Party"), 14 (the "requesting Party may require that the requested Party keep confidential the fact and substance of the request [and if]. . . the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party"), 15 (listing the bases for refusal to execute a request, including instances in which "the requested Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests" as well as refusal because "it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted"), and 17 ("[m]utual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding . . . .").

We further note that paragraph 12 of Article 7 explicitly provides that requests are to be executed in accordance with domestic law. The importance of that paragraph is that it ensures that the U.S. cannot be required by the Convention to execute requests which would be contrary to our notions of basic principles of justice. For instance, any request for a search warrant to be issued would have to be supported by sufficient facts to establish probable cause within the meaning of the Fourth Amendment of the Constitution.

6) (Question from Senator Helms) There are things lacking in this giant MLAT such as the right to counsel. Does that mean that the United States will refuse to comply with MLAT requests by those states which do not comply with our Bill-of-Rights standard of justice?

Answer: As explained more fully in the answer to the next question, it is settled in the United States that the Constitutional provisions override conflicting provisions in treaties and conventions. Further, as noted in the answer to the immediately preceding question, the Convention provides that a requested Party is not required to execute a Request which would be contrary to its legal system and that all requests are to be executed in accordance with domestic law. Therefore, it is clear that the Bill-of-Rights standard of justice governs the execution in the United States of requests made under the Convention. It is also settled that the Bill-of-Rights does not govern the administration of justice in foreign countries.

7) (Question from Senator Helms) Why is there so much objection to a proviso that guarantees the supremacy of the Constitution with respect to this convention? We had one in the Genocide Convention, and it should be even more important for a convention that deals with process rather than substantive law.

Answer: The proposed proviso is surplusage insofar as U.S. law is concerned, as explained below. The danger of such a proviso (and, thus, the basis for our objection) is that it would be a precedent for other countries which, were they to adopt similar provisos, might affect their responsibilities under the Convention in a manner adverse to U.S. interests. For instance, unlike the United States in which Constitutional Amendments are rare and accomplished only with great difficulty, many other countries change Constitutional provisions easily and frequently. Adoption of such a proviso by the U.S. would flag a method for use by such countries by which they would be empowered domestically to void any of the Convention's obligations.

The supremacy of the Constitution over treaties and conventions is well established in the United States. Justice Black, underscored this point well in Reid v. Covert, 354 U.S. 1 (1957), at pages 16-18, stating:

> There is nothing in [the Constitution] . . . which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in "pursuance" of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights - let alone alien to our entire Constitutional history and tradition - to construe Article VI as permitting the United States to exercise power under an international agreement without observing Constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty. For example, in Geofroy v. Riggs, 133 U.S. 258, 267, it declared:

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

There is nothing in Missouri v. Holland, 252 U.S. 416, which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier. [Footnotes omitted.]

We do not know what the effect of language such as the one in the proviso you suggest would have under the laws of other countries. It is conceivable that under some systems of government it could render their obligations contained in the Convention null and void. It is settled that if the United States were to adopt such a proviso, other States Parties could invoke it against the United States on the basis of reciprocity.

Therefore, as stated above, we are opposed to such a proviso for the reason that it is meaningless within the United States and might be adverse to our interests outside the United States.

8) (Question from Senator Helms) How can we have any confidence that states Party to the agreement involved in illicit narcotics activity will be of any use whatsoever in our drug eradication efforts?

Answer: Unfortunately, the article on eradication is not nearly as strong as we would like. We had hoped that this article would contain not only a re-affirmance of the strong obligation to eradicate illicitly cultivated crops contained in the Single Convention but also an affirmative obligation to use herbicides where appropriate. We faced united opposition from the South American countries who were adamant that any obligation to eradicate include an obligation on Parties to provide economic assistance to those countries where the crops were grown. The resultant article, although it does not contain an explicit statement on herbicides, does preserve the strong obligations to eradicate contained in the Single Convention. In addition, although this article encourages economic cooperation, it does not condition eradication on economic assistance.

9) (Question from Senator Helms) There are a number of signatories to this convention that have been known in the past to have either conspired in, or have been major transit points for, narcotics trafficking. Specifically, I am referring to countries such as Panama, Cuba, Afghanistan, the Bahamas, Mexico, Iran and Nicaragua. As the treaty now stands, Nicaragua could, for example, claim that it possesses information that implicates CIA officials in illicit narcotic activity, and request extradition of that person or persons. How does the United States intend to insure that such a case does not arise? Doesn't this issue lead to the larger question of whether the United States should have been party to such a treaty at all?

Answer: Our experience indicates that the hypothetical posed is unlikely to occur. The United States currently has bilateral extradition treaties with Panama (34 Stat. 2851, TS 445 (1905)), the Bahamas 47 Stat. 2122, TS 849 (1935)), Mexico (31 UST 5059, TIAS 9656 (1980)), and Nicaragua (35 Stat. 1869, TS 462 (1907)) under which they could make politically motivated requests such as that described in the question. In any event, the United States has ample authority to reject requests for extradition made in bad faith.

It is further noted, as explained in response to a previous question, that the Convention does not require the U.S. to extradite to those countries such as Afghanistan and Iran with which it has no bilateral extradition treaty.

All of the countries mentioned in this question are party (as is the United States) to the Single Convention on Narcotics (done at New York March 30, 1961, 18 UST 1407, TIAS 6298). The United States has never had occasion to regret its decision to accede to that Convention. On the contrary, the United States has made beneficial use of the Single Convention on many occasions.

Therefore, the Administration strongly believes that the benefits accruing to it under this Convention clearly outweigh the danger suggested in this question.

10) (Question from Senator Helms) During his testimony before the Committee on this subject, Professor Bassiouni suggested that one way to cure the defects in the MLAT provision would be for Congress to enact legislation that set down procedures that were to be followed under any MLAT Treaty. Would you have any objection to this type of legislation?

Answer: The issue of whether the Department should propose general legislation for mutual legal assistance has been discussed within the Department on various occasions. Whether the Department will seek such legislation and what the contours of such legislation would be has yet to be decided by the Department.

11) (Question from Senator Helms) Why did the United States become a signatory to this convention without a similar proviso to that which the Senate adopted in the Genocide Convention which stipulated the supremacy of the U.S. Constitution?

Answer: Our reasons in this regard are explained at length in response to question 7 above.

12) (Question from Senator Helms) Regarding the issue of extradition under the terms of this convention, will the requested party have the right to review relevant evidence that is possessed by the requesting party?

Answer: The Convention does not affect the procedures used by the United States when it is the requested party in an extradition matter. Domestic U.S. law requires judicial and administrative review of the relevant evidence in the case.

Whether it would change the domestic practice in this regard of any other signatories to the Convention is unknown.

RESPONSES BY MR. THORNBURGH TO QUESTIONS ASKED BY THE COMMITTEE

13) The National Association of Criminal Defense Lawyers has brought to the attention of members of the Committee its concern that several provisions of the Convention, aimed at preventing money laundering and transfers of property to avoid forfeiture, would have a deleterious effect on the ability of individuals to obtain legal representation in connection with narcotics offenses.

Specifically, the Association believes that the provision in Article 3.1(b)(i), which requires each party to the Convention to criminalize the transfer of property "knowing that such property is derived from any [narcotics] offense . . ., for the purpose of assisting any person who is involved in the commission of such an offense . . . to evade the legal consequences of his actions" would automatically expose to criminal prosecution any retained criminal defense lawyer who lost a drug case. They argue that all it would take to satisfy the "transfer of property" element would be a fee payment or reimbursement of expenses.

How do you respond to this concern?

Answer: In the context of this question, Article 3.1.(b)(i) criminalizes the knowing conversion of property derived from narcotics production, distribution or possession for the purpose of assisting another avoid detection. It is, in essence, a money laundering statute which is very similar to 18 U.S.C. § 1956. NACDL's reads this article too broadly. In essence, they read it as if it were a receiving stolen property statute. That is, they assert that if an attorney received money for legitimate representation purposes he/she could be prosecuted if it turned out that the money was derived from a narcotics offense. Such was not the intention of the drafters of this Article nor can the statute be properly read to encompass this conduct. The Article requires a "conversion or transfer" for the purpose of "concealing or disguising assets" or "evading the legal consequences of his action." The term evasion implies criminal purpose -- not legal avoidance through bona fide representation by counsel.

14) The second provision of the Convention raised by the Association of Criminal Defense Lawyers is Article 3.1(c)(i). They argue that the provision would punish the lawyer's guilty knowledge of the source of the client's money, even if obtained through privileged attorney-client communications. The mere receipt of the property, with knowledge of the tainted source, would be sufficient to prove criminal culpability of the lawyer.

Do you believe that this is a valid interpretation of the Convention.

Answer: Subparagraph (c) lists the permissive categories of offenses that the Parties are obligated to establish as offenses under their domestic law. The obligation to establish these offenses is qualified by the limiting chapeau, "subject to its constitutional principles and the basic concepts of its legal system."

The Administration believes that current law is sufficient to satisfy the United States' obligations under this article and does not intend to propose new legislation. Therefore, this article does not expand the liability of attorneys beyond that already contained in U.S. law.

15) The Association has also raised the concerns abut the "broad wording" of Article 3.1(c)(iv) in that it would punish aiding, abetting, "facilitating" or "counselling" the commission of a narcotics offense -- terms which could be applied to any attorney in the same manner as those raised in the first question.

What is your response to this concern?

Answer: Article 3.1(c) (iv) would criminalize the conduct of anyone who aids or abets the commission of a narcotics offense, subject to constitutional principles and the basic legal concepts of a nation's legal system. 18 U.S.C. § 2 provides the same in the United States. In the context of money laundering operations which assist narcotics offenses, it has long been recognized that money launderers can properly be charged with a conspiracy to violate the narcotics laws and, under Pinkerton[2] liability theories, a substantive narcotics offense for their activities which aid or abet the distribution of narcotics. See e.g., United States v. Orozco-Prada, 732 F.2d 1076 (2nd Cir. 1984). This Article is a proper reflection of current United States law.

16) The Association also argues that the forfeiture provision of Article 5 would have a chilling effect on the right to counsel. They say that instead of threatening to imprison lawyers, these programs would simply ensure that they would not be paid for their service.

Please respond to this issue.

Answer: The forfeiture provisions of Article 5 do not reach as far as present United States law. In pertinent part, they only provide for the forfeiture of proceeds derived from narcotics offenses and narcotics-related offenses. Current United States law authorizes forfeiture of instrumentalities and facilitating property. Further, current United States law authorizes the forfeiture of attorney fees. Indeed, in two related cases this term the United States Supreme Court upheld the constitutionality of attorney fee forfeitures. See U.S. v. Caplan and Drysdale, 109 S.Ct. 2646 (1989), and U.S. v. Monsanto, 109 S.Ct. 2657 (1989). Article 5 does nothing to expand current United States forfeiture law or practice.

17) Finally, the Association has made a series of recommendations which they believe could be achieved through declarations to accompany the United States' instrument of ratification. Please give us your recommendations for each of the recommendations listed below:

-- A definition of the term "assisting . . . to evade the legal consequences" (Art. 3.1(b)(i) which clarifies that it is not intended to apply to the otherwise lawful furnishing of legal representation services.

Answer: As discussed in response to question one, the article itself makes this clear on its face. Therefore, the proposed definition is not necessary.

-- An explanation that the term "constitutional principles and basic concepts of its legal system" (Art. 3.1 (c)) emphatically contemplates that the right to legal representation is basic in every country.

Answer: While that statement is accurate with respect to the United States, we have insufficient knowledge of the legal systems of potential signatories to know whether this is true for them.

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[2] Pinkerton v. U.S., 328 U.S. 640 (1946).

-- A clarification that the term "bona fide third party" is intended to encompass attorneys who provide lawful legal representation services in return for fair, good faith compensation (see U.S. Attorneys' Manual 9-105.410).

Answer: Again, while that is an accurate statement of the law in the United States, we lack sufficient knowledge to know whether this is true for all potential signatories.

-- A clarification that confiscation of "proceeds derived from [narcotics] offenses" is intended to apply only to offenses which have been proven in a criminal proceeding, with all its fundamental trappings, including full due process and the right to counsel.

Answer: This is not a correct statement of United States law. United State law permits the forfeiture of proceeds in both administrative and civil actions in addition to criminal forfeitures. As such, inclusion of such a statement would be an incorrect statement of the present United States forfeiture law and practice.

18) Implementing Legislation. The Letter of Submittal accompanying transmittal of the Convention indicates that proposed legislation necessary to implement the Convention will be submitted to Congress in the "near future".

-- When do you anticipate such legislation will be submitted?

Answer: We hope to submit the necessary legislation within a month.

-- Which provisions of the Convention require implementing legislation?

Answer: In order for the United States to fully implement the international forfeiture obligations of Article 5, paragraph 4, Section 981 of Title 18 must be amended to allow our courts to forfeit the instrumentalities of foreign drug felonies as well as the proceeds of such crimes.

Title 18, United States Code Section 981(a)(1)(B) allows the forfeiture of property located within the United States which

> represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act) within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United

> States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States.

Section 981 does not grant authority to forfeit instrumentalities used in or intended for use in foreign drug trafficking crimes. To fully implement Article 5, paragraph 4, Section 981 should be amended to include forfeiture of the instrumentalities of drug foreign felonies.

The Articles on jurisdiction and on extradition also require implementing legislation. Paragraph 9 of Article 6 (extradition) imposes an obligation on a Party to submit the case to its competent authorities for the purpose of prosecution if extradition is refused for certain circumstances. The paragraph must be read in tandem with Article 4, paragraph 2 which obligates Parties to extend their jurisdiction in certain instances when extradition is refused. This provision is an extradite or prosecute provision commonly referred to in civil law states as aut dedere aut judicare. Subparagraph (a) of paragraph 9 first imposes an obligation to submit for prosecution if extradition is refused because the offenses involved occurred on the territory of the Requested Party or on board a ship or aircraft registered under its law. The existence of United States territorial jurisdiction is not a ground for refusal of extradition under United States law. The second obligation to submit for prosecution occurs in those instances where extradition is refused because the offender is a national of the requested Party. The Supreme Court has held that the United States may extradite its nationals only in the absence of any limiting language in a bilateral treaty. Charlton v. Kelly 229 U.S. 447 (1913). However, if an extradition treaty contains language which limits that authority, e.g., "neither party shall be bound to deliver up its own citizens", the Court has held that U.S. nationals may not be extradited unless the treaty also contains a positive grant of authority to surrender U.S. citizens. Valentine v. United States ex rel Neidecker, 299 U.S. 5, 7-12 (1936). Post-Valentine extradition treaties of the United States contain language such as "[N]either of the contracting Parties shall be bound to deliver up its own citizen under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it is deemed proper to do so." (Emphasis added). Such a clause contains the necessary positive grant of authority to the Executive to extradite United States citizens.

Although all post-Valentine treaties contain such a clause, the United States still has several pre-Valentine treaties in force that contain the limitation but lack the requisite grant of authority. In those rare instances, the United States must refuse to extradite based on the nationality of the offender. Paragraph 9(a) thus obligates the United States to submit such cases to our competent authorities for the purpose of prosecution.

Since we would not have extraterritorial jurisdiction to prosecute such cases, it is the Administration's intention to remedy the problem caused by some pre-Valentine treaties by seeking legislation to permit the surrender of U.S. nationals notwithstanding the language of limitation in those treaties. Unless this is done, we will be obligated under Article 4, paragraph 2(a)(ii) to establish extraterritorial jurisdiction to prosecute U.S. nationals here for Article 3(1) offenses committed abroad, in those situations in which we cannot extradite to a requesting country because of the Valentine problem. In view of the general U.S. policy favoring extradition of nationals to the country where the greatest harm has been suffered because of the commission of criminal acts, and against creating "universal" jurisdiction, we believe it preferable to eliminate the situations in which we cannot extradite our nationals rather than create jurisdiction to prosecute them when we cannot extradite them.

-- Has there been any systematic evaluation of the steps that would have to be taken by other U.N. Convention signatories to bring their laws in line with their responsibilities under the Convention?

Answer: There has not been a systematic evaluation to date of the steps that other countries must take to bring their laws in line with the new Convention. Informal consultations with many countries that have indicated their commitment to ratify the Convention have revealed substantial differences in the amount of domestic legislation that will be needed. For some countries, the Convention will be self executing and upon ratification become positive domestic law. Some countries have most of the necessary legislation in place already. Others require detailed legislation and are in process of enacting it. Many other countries will need to enact extensive legislation particularly in the areas of forfeiture and precursor chemicals.

We have offered during the course of the informal consultations with a number of countries to provide them technical assistance in drafting the necessary legislation.

-- Do you think there is the political will in countries such as Colombia and Peru to pass necessary implementing legislation for the treaty?

Answer: Although we believe that there is growing international will to take the steps necessary to implement the new Convention, we are aware that there are serious problems facing many countries, such as insurgency, economic hardships and corruption. At the negotiations, both Colombia and Peru strongly supported the Convention and expressed their commitment to implement it.

-- In testifying before this Committee in connection with the pending six Mutual Legal Assistance Treaties, Deputy Assistant Attorney General Mark Richard expressed concern that too often what is given in the treaty is taken away through the implementing legislation. Do you have similar concerns with respect to this treaty?

Answer: We are concerned, of course, that the implementing legislation passed by many countries will either not fully meet the obligations of the Convention or that it will impose unforeseen procedural roadblocks to providing international assistance. Because many of the provisions are new to many countries, we believe that in the beginning it may be difficult to fully implement the treaty. We will work with the various countries as much as possible to develop ways to streamline the cooperation promised by the Convention.

19) Bank Secrecy. Various countries' bank secrecy laws have, in some cases, been a major stumbling block to U.S. anti-narcotics efforts. The U.N. Convention explicitly states that bank secrecy shall not be grounds for refusing to render assistance. At the same time, the Convention states that the assistance provided under the Convention will be consistent with domestic law.

-- In cases where these two provisions conflict, which has precedence?

Answer: The obligation in paragraph 7(5) prohibiting a refusal to grant assistance because of bank secrecy laws is, at least, two-fold. First, it is an obligation to enact implementing legislation, if necessary, to modify domestic bank secrecy laws to permit execution of requests for bank records under the Convention. Second, with respect to an individual request for bank records under the Convention, it obliges a requested Party to grant the request, if the only basis for refusing would be bank secrecy laws.

Therefore, inasmuch as the Convention requires the Parties to amend their bank secrecy laws to avoid a conflict between a valid request for bank records under the Convention with domestic laws, the conflict described in this question should not arise. If, however, such were to occur, the Parties understand that the Convention is to take precedence.

It is further noted that the provision concerning the rendering of assistance in accord with domestic law in paragraph 7(4) is understood by the Parties to deal with facilitating or encouraging the testimony of a witness from the requested Party in the territory of the requesting Party (e.g., a Canadian request that a witness in the U.S. travel to Canada to appear at a trial in that country). The subparagraph provides that the requested Party is only obligated to facilitate or encourage such foreign travel to the extent permitted by its domestic law and practice.

-- Could you please discuss for the Committee the success or failure of previous MLATs as they related to bank secrecy laws?

Answer: The Mutual Legal Assistance Treaties with Switzerland,[3] the Netherlands,[4] Italy,[5] and Turkey[6] and related Executive Agreements, particularly the one with the Cayman Islands,[7] have been very successful. The United States has obtained bank records under those agreements for use in U.S. prosecutions in literally hundreds of cases in which those countries would have otherwise denied our requests on the basis of general bank secrecy laws.

-- Panama is one of those countries that has signed the Convention that is a major money laundering center. Given the political climate in that country, what is your assessment of the likelihood that the United States will achieve real cooperation from the Panamanian government in gaining access to bank records?

Answer: We recognize that the present powers in Panama lack respect for the rule of law, both domestic as well as international. We are, therefore, extremely skeptical that they will honor their obligations under this Convention.

The Administration is hopeful that Panama will elect and install a government in the near future which will honor all of its international legal obligations.

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[3] Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, signed at Bern May 25, 1971, 27 UST 2019, TIAS 8302 (entered into force January 23, 1977).

[4] Treaty between the United States and the Kingdom of the Netherlands, together with a Related Exchange of Notes, signed at the Hague on June 12, 1981, TIAS 10734 (entered into force September 15, 1983).

[5] Treaty between the United States and the Italian Republic on Mutual Assistance in Criminal matters, together with a Related Memorandum of Understanding, signed at Rome on November 9, 1982, TIAS ____ (entered into force November 13, 1985).

[6] Treaty between the United States and the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters, signed at Ankara June 7, 1979, 32 UST 311, TIAS 9891 (entered into force January 1, 1981).

[7] Narcotics Cooperation Agreement between the United States and the United Kingdom of Great Britain and Northern Ireland, with respect to the Cayman Islands, entered into force on August 29, 1984, TIAS ____.

20) Defendants' access to information. What provisions, if any, are there in the U.N. Convention relating to defendants' access to information acquired by a competent authority under the treaty? Does the Convention explicitly exclude the use by a private party of any mechanism under the treaty?

Answer: None of the provisions in the Convention relate to defendants' access to information acquired by a competent authority under the treaty.

While the Convention's exclusion of use of its mechanisms by a private party is not explicit, it is implicit in the language of Article 2, paragraph 1, that "The purpose of this Convention is to promote co-operation among the Parties. . . ."

21) Validity of evidence obtained in a manner illegal in the U.S. If evidence were sought from a foreign country, and that evidence had been obtained in a manner that would be illegal in the United States, can that evidence be used in court here in the United States?

Answer: There is no simple answer to this question. The prevailing rule is that neither the Fourth Amendment to the Constitution nor the exclusionary rules apply to evidence obtained through searches and seizures by foreign officials. Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968); Brulay v. United States, 383 F.2d 345 (9th Cir. 1967). Knapp, Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy, 20 Case Western Journal of International Law 405, 431 (1988). there are two judicially recognized exceptions to this rule: the exclusionary rule may be applied where United States agents participated in the foreign search so substantially as to convert it into a joint venture, United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir., 1988), Cert. Granted, __ U.S. __, April 17, 1989 (case number 88-1353), and Stonehill v. United States, at 743, and where the action taken abroad in collecting the evidence is so brutal and inhuman that it "shocks the conscience of the court," Toscanino v. United States, 500 F.2d 267 (2nd Cir. 1974); Knapp, 405. In cases falling within these exceptions, the evidence is subject to suppression and cannot be used in criminal prosecutions in the United States. See, generally, Note, The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries, 16 Columbia Journal of Transnational Law 495 (1977); Note, The New International "Silver Platter" Doctrine: Admissibility in Federal Courts of Evidence Illegally Obtained by Foreign Officers in a Foreign Country, 2 Journal of International Law and Policy 280 (1969); Note, The Fourth Amendment Abroad: Civilian and Military Perspective, 17 Virginia Journal of International Law 515 (1977); Raffel, Searches and Seizures Abroad in the Federal Courts, 38 Maryland Law Review 689 (1979); Saltzburg, The Reach of the Bill of Rights Beyond the Terra Firma of the United States, 20 University of Virginia Journal of International Law 741 (1980).

Other factors the courts must consider include:

(A) Who obtained the evidence overseas. Most courts say that the exclusionary rule does not apply to the actions of foreign officials unless United States agents participated in the activity so substantially as to convert it into a joint venture. When our participation reaches that level of substantiality is rarely clear. The fact that the United States asked for the evidence pursuant to this Convention or a mutual legal assistance treaty, standing alone, would not be enough to convert the subsequent efforts by foreign authorities to obtain the evidence into a "joint venture."

(B) The manner in which the evidence was obtained and the basis for concluding that the manner would have been illegal in the United States. If, for instance, the evidence is the fruit of illegality that is "shocking to the conscience" (such as torturing a witness to extract a statement), that evidence might be excluded on Fifth Amendment grounds. This is because the manner in which such evidence was taken casts doubt on its reliability. Saltzburg, The Reach of the Bill of Rights Beyond the Terra Firma of the United States, 20 University of Virginia Journal of International Law 741 at 765, n. 125 (1980). On the other hand, if the only illegality is that a warrant from a U.S. judicial officer would have been needed were the evidence found in the United states, it should be irrelevant that no U.S. warrant was obtained. That is because there is no authority for courts to issue warrants overseas, even though some writers urge that our courts should claim "inherent power" to do so in the absence of authority, see, e.g., Raffel, Searches and Seizures Abroad in the Federal Courts, 38 Maryland Law Review 689 (1979). But see United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir., 1988), Cert. Granted, __ U.S. __, April 17, 1989 (case number 88-1353).

(C) How the evidence is to be used in the United States. The exclusionary rule applies only in criminal cases, and hence the manner in which evidence was obtained abroad may be irrelevant if the evidence is for use in a civil matter, such as a civil forfeiture proceeding.

22) I note that Panama is also a signatory to the Convention. If Panama requested legal assistance under this treaty, would the U.S. competent authority comply with that request? If Panama made an extradition request under the treaty, would the U.S. comply? What safeguards are there in the treaty to assure that requests for assistance from countries such as Panama which are signatories to the Convention are not used to subvert the very purpose of the Convention?

Same questions for Cuba and Nicaragua.

Answer: Extradition. The Administration takes the position that our law and practice require that there be a bilateral treaty between the United States and the country requesting extradition in order for the United States to grant extradition. the language of Article 6, paragraph 3, providing that a Party which requires a treaty basis for extradition may consider this Convention as that required basis, was intentionally drafted to be discretionary in order that this Convention not affect our right to refuse extradition unless there is a bilateral extradition treaty in place.

Therefore, this Convention does not establish extradition relations with any country with which the United States does not have a bilateral extradition treaty.

The Department of State has taken the position that while our extradition treaty with Cuba[8] is still in force, at this time it will neither accept requests from Cuba nor submit requests to Cuba. This Convention will not change that position.

Our extradition treaties with Nicaragua[9] and Panama[10] are both very old. Yet the United States has never received a request such as one suggested by this question from either country. If it were to, it would be rejected pursuant to the power of the Secretary of State to refuse to accede to an improperly and politically motivated request for extradition. See Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981); Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971),

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[8] 33 Stat. 2265, TS 440 (1905), 33 Stat. 2273, TS 441 (1905), and 44 Stat. 2392, TS 737 (1926).

[9] 35 Stat. 1869, TS 462 (1907).

[10] 34 Stat. 2122, TS 849 (1935).

RESPONSES BY MR. THORNBURGH TO QUESTIONS ASKED BY SENATOR BIDEN

23) (Question from Senator Biden) Procedural Protections

Concerns have been raised about the lack of procedural protections in the new U.N. Anti-Drug Treaty.

QUESTION: What provisions does the Treaty contain to protect the Constitutional and legal rights of U.S. citizens?

Answer: Inasmuch as the supremacy of the Constitution over treaties and conventions is well established in the United States, as explained by Justice Black in Reid v. Covert, 354 U.S. 1 (1957), at pages 16-18, it is unnecessary for a treaty or convention to be explicit for Constitutional rights to remain inviolate.

Nevertheless, this Convention does have a great many provisions which, from the U.S. perspective, address this issue. The most basic of these provisions is contained in Article 2, Scope of the Convention:

> 1. The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems. [Emphasis added.]

Other, similar provisions in the Convention, likewise drafted to guarantee basic domestic rights and privileges, include:

Article 3, relating to offenses and sanctions:

> 1. . . . .
>
> (c) Subject to its constitutional principles and the basic concepts of its legal system. . . .
>
> 2. Subject to its constitutional principles and the basic concepts of its legal system. . . .
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> * * * *
>
> 11. Nothing contained in this article shall affect the principle that the description of the offenses to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offenses shall be prosecuted and punished in conformity with that law.

Article 5, relating to forfeiture:

> 9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.

Article 6, relating to extradition:

> 5. Extradition shall be subject to the conditions provided for by the law of the requested Party . . . .
>
> 6. In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.
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> * * * *
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> 8. Subject to the provisions of its domestic law and its extradition treaties, the requested Party may . . . .
>
> 9. Without prejudice to the exercise of any criminal jurisdiction established in accordance with its domestic law . . .
>
> 10. If extradition . . . is refused. . . the requested Party shall, if its law so permits and in conformity with the requirements of such law . . . .

Article 7, relating to Mutual Legal Assistance:

> 4. Upon request, the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice. . . .
>
> * * * *
>
> 11. The requested Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law. . .
>
> 12. A request shall be executed in accordance with the domestic law of the requested Party. . . .
>
> 15. Mutual legal assistance may be refused:
>
> * * * *

> (c) If the authorities of the requested Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or proceedings under their own jurisdiction;
>
> (d) If it would be contrary to the legal system of the requested Party relating to mutual legal assistance for the request to be granted.

Article 11, relating to controlled deliveries:

> 1. If permitted by the basic principles of their respective domestic legal systems. . .

24) (Question from Senator Biden) Money Laundering

The U.N. Convention requires the participating nations to enact money laundering laws and to modify bank secrecy laws to facilitate the identification, tracing and seizure of drug proceeds.

QUESTION: Does the Convention require any change in U.S. money laundering or bank secrecy statutes?

Answer: Current United States money laundering laws, 18 U.S.C. §§ 1956-57, satisfy our obligation to enact domestic money laundering laws. Much of the language of paragraph 1(b) of Article 3 is derived from United States statutes on money laundering. Two modifications were made on the U. S. statutes. First, the Convention's money laundering offenses relate only to property derived from illegal drug offenses. Second, because the Convention makes no attempt to impose currency reporting requirements, there are no references to actions to avoid such requirements.

The Convention does not require any change in U.S. bank secrecy statutes. A recent ruling of the United States Court of Appeals for the Second Circuit clarified that disclosure of U.S. bank records for a foreign legal proceeding pursuant to a court appointed commission is not subject to the Right to Financial Privacy Act. See Young v. Department of Justice, No. 88-6314 (2d Circuit, August 8, 1989).

QUESTION: The U.N. Convention explicitly states that bank secrecy shall not be grounds for refusing to render law enforcement assistance. At the same time, the Convention states that any assistance provided must be consistent with a country's own laws. In cases where these two provisions conflict, which will control?

Answer: See answer to question 19, *supra*.

25) (Question from Senator Biden) European Economic Community

In 1992, the countries of Western Europe will make a number of very significant changes in the way goods and currency move from one country to another. Some believe that the reduction in restrictions on trade will make it easier for illegal money to be laundered through the banking system because criminals will be able to move funds from one country to another without having to convert and register the currency.

QUESTION: What impact will the economic unification of Western Europe have on the ability of U.S. law enforcement to trace money derived from U.S. drug violations?

Answer: Obviously no one can predict precisely what effect the economic unification of Western Europe may have on the ability of U.S. law enforcement to trace money derived from U.S. narcotics violations. Conceivably, a unified currency may actually facilitate the tracing of such funds. The unification effort stems in part from the interest of all Western European nations to cooperate more fully on economic issues. Such cooperation will benefit all law enforcement efforts to trace funds.

QUESTION: Do the European Countries presently have money laundering statutes that allow them to adequately address money laundering that takes place between their borders and to cooperate with U.S. law enforcement agencies?

Answer: At this time most European countries lack statutes to adequately address money laundering offenses. Since the signing of the United Nations Convention in December 1988, the signatory countries have begun addressing what legislation, particularly regarding money laundering, may be necessary to meet their obligations under the Convention. Such efforts, along with the very fact that so many countries entered into the Convention, attests to a strong desire among countries to address money laundering, as well as the whole panoply of narcotics and narcotics related offenses.

QUESTION: Should the Europeans adopt a centralized system of monitoring currency transactions? What is our government doing to assist the Europeans in this effort?

Answer: The European countries are seriously considering a centralized system to monitor currency transactions, as well as other measures, to address money laundering activities. A Financial Action Task Force, comprised of representatives of the United States and Western European countries, will convene beginning in late September 1989 to consider a number of agenda items including methods to monitor currency transactions. As long ago as 1986, the Committee of Inquiry into the Drug Problem in the Member States of the Community of the European Parliament, resolved that a single community currency transaction report form to record and monitor all cash transactions above a certain specified amount (e.g. 10,000 ECU) should be used by all EEC financial institutions.

Through the Working Groups which compromise the Financial Action Task Force, the United States intends to assist in this effort by whatever means appears most appropriate.

26) (Question from Senator Biden) Compliance with Treaty

One of my greatest concerns about the new treaty is that it does not contain any formal mechanisms to ensure compliance.

Past U.S. drug treaties have addressed drug issues. The U.N.'s 1961 Singe Convention on Narcotic Drugs required countries to issue licenses to anyone who was producing drugs for legitimate medical reasons and to take all steps necessary to eradicate illegal production.

QUESTION: Does the new treaty contain any formal mechanisms to enforce compliance?

Answer: Please see the answer to question number 4, above.

QUESTION: In the report that the Senate Caucus on International Narcotics Control issued in 1987 on the first draft of the treaty, we recommended that the negotiators consider some mechanisms for imposing sanctions -- diplomatic and/or economic -- against countries that failed to meet their obligations under the treaty. What consideration was given to our recommendations?

Answer: Executive Branch members involved in the negotiations did consider many of the recommendations in the aforementioned report. Regarding diplomatic and/or economic sanctions, the U.S. negotiators succeeded in obtaining consensus on strong oversight articles (Articles 21 and 22) which do allow for diplomatic actions by the Board, which can be interpreted as sanctions, in the form of Board intervention, if and when the need arises. In matters of contravention of the Single and Psychotropic Conventions, the Board has undertaken delicate negotiations with errant Parties that have produced the same result as a diplomatic sanction, e.g., actions by the Party to rectify the problem in question.

We believe that the issue of economic sanctions is a matter which should be determined by a Party or parties seeking the compliance of another Party to the Convention. While imposition of economic sanctions is not addressed in the Convention, the Convention does not impede such measures by Parties.

QUESTION: Would the Administration support an annual compliance report -- in effect, a "report card" issued by one of the U.N. drug agencies, on whether countries were living up to their commitments under the treaty?

Answer: An annual compliance report issued by the Commission or the Board is feasible. Articles 21 and 22 allow for both the Commission and the Board to collect information from parties, make suggestions and recommendations and issue reports. In Article 23, the Board is tasked with preparing an annual report, as it does already pursuant to the Single Convention and Psychotropic Convention. The Board's annual report does highlight any problems States parties may be having in fulfilling their obligations under the conventions. Theoretically, it could augment its report and provide a more comprehensive checklist or report card. The U.S. would support such a concept, in principle.

27) (Question from Senator Biden) Multinational Anti-Drug Strike Forces

The 1988 Anti-Drug Abuse Act included a provision directing the Secretary of State to initiate negotiations to create a multinational "strike force" that could pursue the leaders of the major drug trafficking cartels across national borders. In this way, drug traffickers would have no sanctuary.

Earlier this month the Prime Minister of Jamaica called for the establishment of multi-country strike forces, possibly under U.N. auspices.

QUESTION: Does the Administration support the creation of multinational drug strike forces?

Answer: The Administration is currently studying the possibility of the creation of a multilateral drug strike force. Although we recognize many advantages of such a strike force, we are concerned about the costs, effectiveness, and international acceptance of such a force. The personnel of such a strike force would face extremely dangerous situations because the traffickers are heavily armed and ruthless. Questions of appropriate personnel, proper equipment, and training must also be explored.

QUESTION: Has the United States -- or any other nation -- initiated negotiations within the United Nations on this proposal?

Answer: The United States has not initiated negotiations within the United Nations to date. We understand that the government of Jamaica intends to formally present such a proposal to the General Assembly of the United Nations. There is no precedent in U.N. practice for the creation of a U.N. force to pursue the leaders of major drug trafficking cartels, and the proposal raises may questions regarding the role of the U.N. in such matters.

28) (Question from Senator Biden) Eradication

In 1962, the United States joined many other countries in ratifying the "U.N. Single Convention on Narcotic Drugs". This treaty, designed to control the legitimate production of narcotic drugs for medical purposes, required countries to issue licenses to any person legally producing drugs. As you know, the 1961 treaty has had little or no impact on coca production in South America.

QUESTION: Does the U.N. Convention that the Attorney General Signed last December contain any new obligations to eradicate drugs beyond what is in the 1961 treaty?

Answer: No. The new Convention does not contain any new obligations to eradicate. The obligations contained in the 1961 Convention are very strong. Unfortunately, parties to that Convention have not met those obligations, particularly in the areas of coca and marijuana eradication. The new Convention does state affirmatively that the Parties may not take measures to eradicate illicit cultivation that are less stringent than measures stipulated in the 1961 Single Convention as amended by the 1972 protocol and the 1971 Psychotropic Convention.

QUESTION: For example, does the new treaty contain any numerical goals or timetables for countries to eradicate drugs within their borders?

Answer: No. There are no time tables or numerical goals for eradication established in the Convention.

QUESTION: Does the new treaty require countries to use chemical herbicides for eradication?

Answer: No. The Convention does call for cooperation in eradication efforts and for the exchange of scientific and technical information and the conduct of research concerning eradication.